E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

March 23, 2011

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Lisa P. Jackson, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Notice of Intent to File Suit Under § 304 of the Clean Air Act For Failure to Perform Nondiscretionary Duties

Dear Administrator Jackson:

I hereby give notice on behalf of the State of Oklahoma of intent to file suit against the Administrator of the United States Environmental Protection Agency ("Administrator" or "EPA") pursuant to Clean Air Act § 304(b)(2), 42 U.S.C. § 7604(b)(2) and 40 C.F.R. Part 54. The suit will be filed because EPA was not authorized to propose a Federal Implementation Plan ("FIP") for regional haze in Oklahoma on March 22, 2011, as no final action has been taken regarding Oklahoma's State Implementation Plan ("SIP"). In addition, the window for EPA to propose a regional haze FIP was not open on March 22nd. As a result, EPA has violated its nondiscretionary duty to honor the time constraints provided in Section 110(c) of the Clean Air Act, 42 U.S.C. § 7410(c) in proposing FIPs.

The FIP proposal has a significant impact on Oklahoma and its citizens. It deprives the State of the authority and discretion provided to it by the regional haze provisions of the Clean Air Act. The Act is clear that plans to address regional haze should be made by the State, not by EPA. Oklahoma developed a sound regional haze plan that reflected input from a wide range of interested parties. EPA does not have discretion to propose its own plan until after the Agency takes final action on the State's plan.

313 N.E. 21ST STREET • OKLAHOMA CITY, OK 73105 • (405) 521-3921 • FAX: (405) 521-6246

A. Failure to Perform Nondiscretionary Duties

42 U.S.C. § 7410(c) requires the Administrator of EPA to promulgate a FIP within two years of a finding that a state has failed to make a required SIP submittal or the disapproval of a SIP. The statute states:

> (1) The Administrator *shall* promulgate a Federal implementation plan at any time within 2 years after the Administrator—
>
> > (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under section 110(k)(1)(A).
> >
> > (B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

42 U.S.C. § 7410(c) (emphasis added).

EPA published a finding in the *Federal Register* on January 15, 2009 that Oklahoma (and 36 other states, the District of Columbia, and the U.S. Virgin Islands) failed to submit their regional haze SIPs as required by 40 C.F.R. § 51.300-309. 74 Fed. Reg. 2392, 2393 (Jan. 15, 2009). That finding started a two-year clock for EPA to promulgate a regional haze FIP for Oklahoma.

In the finding, EPA affirmed its nondiscretionary duty to promulgate a regional haze FIP for Oklahoma within two years of its January 15, 2009 notice as follows:

> In this action, EPA is finding that 37 states, the District of Columbia, and the U.S. Virgin Islands have failed to make all or part of the required SIP submissions to address regional haze. This finding starts the two year clock for the promulgation by EPA of a FIP. EPA is not required to promulgate a FIP if the state makes the required SIP submittal and EPA takes final action to approve the submittal within two years of EPA's finding.

Id.

EPA did not promulgate a regional haze FIP for Oklahoma by January 15, 2011, its deadline in accordance with its nondiscretionary duty under 42 U.S.C. § 7410(c). Instead, EPA published a notice of proposed rulemaking in the *Federal Register* on March 22, 2011, attempting to promulgate a FIP 66 days after its deadline in accordance with 42 U.S.C. § 7410(c)(1)(A) had passed. As a result, EPA did not have authority (or discretion) to propose a FIP pursuant to 42 U.S.C. § 7410(c)(1)(A) on March 22, 2011.

The FIP proposal also is not authorized (or discretionary) under 42 U.S.C. § 7410(c)(1)(B) which mandates that disapproval of all or part of the proposed Oklahoma SIP is a prerequisite to promulgation of a FIP, and without this triggering event, a FIP is premature. It is especially important for EPA to finish the SIP approval process for regional haze *before* proposing a FIP in light of the significant authority and discretion that the Clean Air Act gives to the *State* in establishing regional haze requirements. Accordingly, the Administrator is in violation of her nondiscretionary duty to honor the time constraints of 42 U.S.C. § 7410(c) in proposing a regional haze FIP for Oklahoma.

B. Notice of Intent to Sue

After the expiration of 60 days from the postmark date of this notice of intent to sue, I intend to file suit, on behalf of the State of Oklahoma, against EPA in federal court for your failure to act in accordance with your non-discretionary duties described in Section A of this letter.

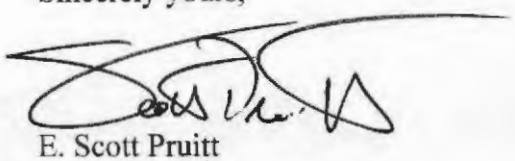
C. Information on Party Giving Notice

As required by 40 C.F.R. § 54.3, the name and address of the party giving notice on behalf of the State of Oklahoma is:

Attorney General E. Scott Pruitt
Oklahoma Office of the Attorney General
313 NE 21st Street
Oklahoma City, OK 73105

If you wish to discuss any portion of this letter, please contact me at the address, phone number, or email address provided on this letterhead. I would be pleased to discuss alternatives for a cooperative resolution to the violations listed in this letter.

Sincerely yours,



E. Scott Pruitt

cc: Al Armendariz
EPA Region 6 Administrator
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
313 N.E. 21ST
OKLAHOMA CITY OK 73105

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS. FOLD AT DOTTED LINE

CERTIFIED MAIL

91 7108 2133 3938 5569 3514

Lisa P. Jackson, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W
Washington, D.C. 20460

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AR
To: Jackson,Lisa
Mailstop: 1101A
Department: Rm 3000
Mailcode:
PKG Condition

EPA

DAILY READING FILE

ALAN WILSON
ATTORNEY GENERAL

March 29, 2011

Hon. Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
EPA Headquarters – Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, D.C. 20460

Dear Ms. Jackson:

As state Attorneys General, we are writing to ask the EPA to defer its program of greenhouse gas (GHG) regulations so that Congress can be given an opportunity to evaluate both the need and timing of such regulations. Such deferral is especially important to us given the disruption that the rapid implementation of the EPA program is causing to the state administrative agencies that we advise and the businesses those agencies have been tasked with regulating.

As you know, litigation is now underway challenging various aspects of the GHG regulations, as well as the Endangerment Finding on which those regulations are based; however, our purpose in writing you is *not* to debate those particular issues. Indeed, those are issues on which all of us are not necessarily agreed. Instead, our purpose today is to ask that you exercise the discretion recognized by the Supreme Court in *Massachusetts v. EPA*, 549 U.S. 497 (2007), with respect to the timing of your regulations by deferring the GHG regulatory program.

Such a deferral would have at least three major advantages:

1. A deferral would allow the current Congress a full opportunity to review the EPA's Endangerment Finding and to determine the best course for our nation to take. The Clean Air Act, under which the EPA has adopted its regulations, is not an effective or efficient vehicle to deal with an issue like the worldwide emissions of GHG's, and the issue calls for full debate by our elected representatives.

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

2. A deferral would relieve the pressure on state agencies scrambling to implement new regulatory requirements in the face of the drastic consequences that your agency has announced it could impose if such implementation is not put in place immediately. As you know, those consequences could include subjecting States to a construction ban and requiring a multitude of relatively small CO_2 emitters – including some houses of worship, hospitals, big box stores, apartment buildings and hotels – to comply with complicated emission and permitting requirements. The EPA has characterized such sweeping application of GHG regulation as an "absurd result" that should be avoided, and we agree.

3. Whatever may be the long term merit of your agency's regulatory approach – an issue on which we may disagree, even among ourselves – there can be no doubt that the immediate consequences will be to make economic recovery more difficult. Deferral would help facilitate such recovery, and it would allow time for a study of the long term impact of GHG regulations on jobs and the economy.

As shown by EPA's own documents, the United States contributes a decreasing fraction of the GHG emissions in the world today,[1] and the total amount of six common pollutants emitted in our country has actually decreased over the last 30 years.[2] Thus, it may be fairly inferred, even from your own documents, that the deferral we request would not have any significant deleterious effect on the global climate.

For these reasons, we respectfully request that your agency defer its GHG regulatory program for at least three years.

Sincerely,

Alan Wilson

Alan Wilson
Attorney General
[Signatures continue next page]

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[1] For example, in 1990, the United States produced approximately 6,000 million metric tons of GHG emissions, compared to a world total of approximately 31,000 million metric tons. By 2005, the GHG emissions in the United States had risen to approximately 7,000 million metric tons, whereas the world total in 1990 had swelled to 38,000 million metric tons. Thus, only about 1/7 of the recent increase in worldwide GHG emissions is attributable to the United States. *Source*: http://www.epa.gov/climatechange/indicators/pdfs/CI-greenhouse-gases.pdf.

[2] Between 1970 and 2008, the United States' population increased by 48 percent, coal-fueled electricity increased by 184 percent and gross domestic product increased by 209 percent; however, non-CO_2 emissions *decreased* by 60 percent. *Source*: www.epa.gov/airtrends/images/comparison70.jpg, www. epa.gov/air/emissions and www.eia.doe.gov/emeu/aer/pdf/pages/sec8_17.pdf

Luther Strange
Attorney General
State of Alabama

John J. Burns
Attorney General
State of Alaska

Dustin McDaniel
Attorney General
State of Arkansas

Tom Horne
Attorney General
State of Arizona

Samuel S. Olens
Attorney General
State of Georgia

Leonardo M. Rapadas
Attorney General
Guam

Derek Schmidt
Attorney General
State of Kansas

James D. "Buddy" Caldwell
Attorney General
State of Louisiana

Bill Schuette
Attorney General
State of Michigan

Jon C. Bruning
Attorney General
State of Nebraska

Wayne Stenehjem
Attorney General
State of North Dakota

Michael DeWine
Attorney General
State of Ohio

E. Scott Pruitt
Attorney General
State of Oklahoma

William H. Ryan, Jr.
Acting Attorney General
State of Pennsylvania

Marty J. Jackley
Attorney General
State of South Dakota

Greg Abbott
Attorney General
State of Texas

Mark L. Shurtleff
Attorney General
State of Utah

Ken Cuccinelli
Attorney General
State of Virginia

Gregory A. Phillips
Attorney General
State of Wyoming

Pam Bondi
Attorney General
State of Florida

ALAN WILSON
ATTORNEY GENERAL

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US POSTAGE

Hon. Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
EPA Headquarters – Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, D.C. 20460

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Alan Wilson
Attorney General of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211-1549

Dear Mr. Wilson:

Last year you and 21 of your colleagues in other states wrote to Administrator Lisa Jackson to express your concerns with the U.S. Environmental Protection Agency's greenhouse gas (GHG) regulations. We appreciate your views on this important matter. Now that more than a year has passed since EPA began to take regulatory actions to control GHG emissions, the Administrator asked that I update you on our progress.

The EPA has issued a number of historic vehicle emission standards that will dramatically reduce GHG emissions, cut fuel costs for consumers, and reduce our nation's dependence on oil. The Obama Administration's three passenger vehicle regulatory programs — the 2011 CAFE standard, 2012-2016 GHG/CAFE standards, and the proposed 2017-2025 GHG/CAFE standards — will double vehicle fuel economy and reduce GHG emissions by one-half for new 2025 vehicles, relative to 2010 vehicles. Over time, they will reduce GHG emissions by 6 billion metric tons, save 12 billion barrels of oil, and provide consumers with $1.7 trillion in fuel savings. In addition, GHG standards for 2014-2018 trucks and buses will save another 270 million metric tons of GHG emissions, 530 million barrels of oil, and $50 billion in fuel costs.

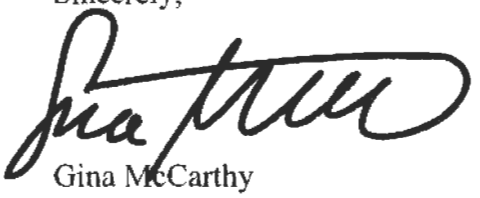
Under the 2010 GHG air pollution permitting rule, known as the Tailoring Rule, virtually all states are taking action on their own or in cooperation with the EPA to ensure that permitting proceeds uninterrupted and smoothly. The EPA and the states have successfully incorporated GHG permitting into existing Clean Air Act permitting programs, and the Tailoring Rule has ensured that only the largest sources of GHG emissions need permits. Since the inception of GHG permitting in January 2011, 19 companies have received Clean Air Act Prevention of Significant Deterioration (PSD) permits that cover GHG emissions. Four of these permits were issued by the EPA. The GHG permits issued thus far have focused primarily on energy efficiency and other common sense approaches to address carbon pollution.

We are pleased that many state agencies are relying upon the guidance and tools made available by the EPA on our GHG permitting website (http://www.epa.gov/nsr/ghgpermitting.html) in making policy and technical decisions regarding GHG permits. Among other things, the GHG website contains letters in which the EPA has provided comments on permit applications or draft permits that are being processed

by state or local permitting authorities. Having these comment letters available provides further guidance to state and local agencies. The EPA continues to review and issue permits and to work with state and local permitting agencies that are reviewing applications.

I hope this information is useful. If you have further questions, please contact me, or your staff may call Anthony Raia in EPA's Office of Congressional and Intergovernmental Relation at (202) 566-2758.

Sincerely,



Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Luther Strange
Attorney General of Alabama
501 Washington Avenue
Montgomery, Alabama 36130-0152

Dear Mr. Strange:

Last year you and 21 of your colleagues in other states wrote to Administrator Lisa Jackson to express your concerns with the U.S. Environmental Protection Agency's greenhouse gas (GHG) regulations. We appreciate your views on this important matter. Now that more than a year has passed since EPA began to take regulatory actions to control GHG emissions, the Administrator asked that I update you on our progress.

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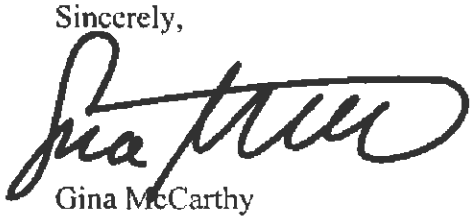

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable John J. Burns
Attorney General of Alaska
P.O. Box 110300, Diamond Courthouse
Juneau, Alaska 99811-0300

Dear Mr. Burns:

Last year you and 21 of your colleagues in other states wrote to Administrator Lisa Jackson to express your concerns with the U.S. Environmental Protection Agency's greenhouse gas (GHG) regulations. We appreciate your views on this important matter. Now that more than a year has passed since EPA began to take regulatory actions to control GHG emissions, the Administrator asked that I update you on our progress.

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Sincerely,

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Dustin McDaniel
Attorney General of Arkansas
323 Center Street, 200 Tower Building
Little Rock, Arkansas 72201-2610

Dear Mr. McDaniel:

Last year you and 21 of your colleagues in other states wrote to Administrator Lisa Jackson to express your concerns with the U.S. Environmental Protection Agency's greenhouse gas (GHG) regulations. We appreciate your views on this important matter. Now that more than a year has passed since EPA began to take regulatory actions to control GHG emissions, the Administrator asked that I update you on our progress.

The EPA has issued a number of historic vehicle emission standards that will dramatically reduce GHG emissions, cut fuel costs for consumers, and reduce our nation's dependence on oil. The Obama Administration's three passenger vehicle regulatory programs — the 2011 CAFE standard, 2012-2016 GHG/CAFE standards, and the proposed 2017-2025 GHG/CAFE standards — will double vehicle fuel economy and reduce GHG emissions by one-half for new 2025 vehicles, relative to 2010 vehicles. Over time, they will reduce GHG emissions by 6 billion metric tons, save 12 billion barrels of oil, and provide consumers with $1.7 trillion in fuel savings. In addition, GHG standards for 2014-2018 trucks and buses will save another 270 million metric tons of GHG emissions, 530 million barrels of oil, and $50 billion in fuel costs.

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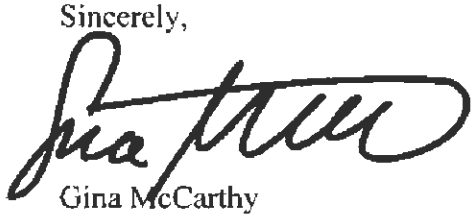

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Tom Horne
Attorney General of Arizona
1275 West Washington Street
Phoenix, Arizona 85007

Dear Mr. Horne:

Last year you and 21 of your colleagues in other states wrote to Administrator Lisa Jackson to express your concerns with the U.S. Environmental Protection Agency's greenhouse gas (GHG) regulations. We appreciate your views on this important matter. Now that more than a year has passed since EPA began to take regulatory actions to control GHG emissions, the Administrator asked that I update you on our progress.

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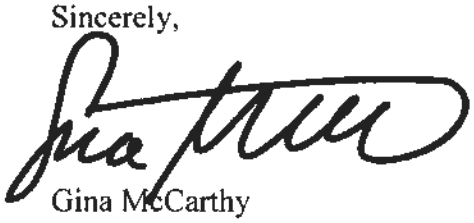

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Samuel S. Olens
Attorney General of Georgia
40 Capitol Square, SW
Atlanta, Georgia 30334-1300

Dear Mr. Olens:

Last year you and 21 of your colleagues in other states wrote to Administrator Lisa Jackson to express your concerns with the U.S. Environmental Protection Agency's greenhouse gas (GHG) regulations. We appreciate your views on this important matter. Now that more than a year has passed since EPA began to take regulatory actions to control GHG emissions, the Administrator asked that I update you on our progress.

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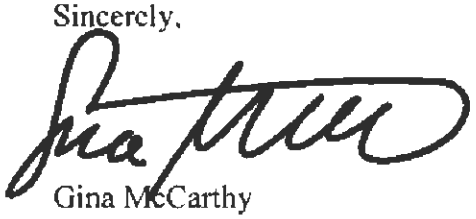

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Leonardo M. Rapadas
Attorney General of Guam
287 West O'Brien Drive
Hagatna, Guam 96910

Dear Mr. Rapadas:

Last year you and 21 of your colleagues in other states wrote to Administrator Lisa Jackson to express your concerns with the U.S. Environmental Protection Agency's greenhouse gas (GHG) regulations. We appreciate your views on this important matter. Now that more than a year has passed since EPA began to take regulatory actions to control GHG emissions, the Administrator asked that I update you on our progress.

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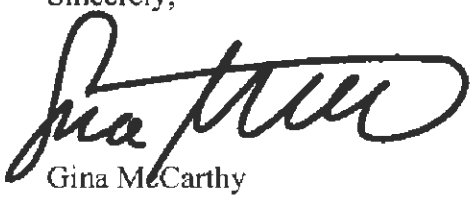

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Derek Schmidt
Attorney General of Kansas
120 S.W. 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597

Dear Mr. Schmidt:

Last year you and 21 of your colleagues in other states wrote to Administrator Lisa Jackson to express your concerns with the U.S. Environmental Protection Agency's greenhouse gas (GHG) regulations. We appreciate your views on this important matter. Now that more than a year has passed since EPA began to take regulatory actions to control GHG emissions, the Administrator asked that I update you on our progress.

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Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable James D. "Buddy" Caldwell
Attorney General of Louisiana
P.O. Box 94095
Baton Rouge, Louisiana 70804-40954

Dear Mr. Caldwell:

Last year you and 21 of your colleagues in other states wrote to Administrator Lisa Jackson to express your concerns with the U.S. Environmental Protection Agency's greenhouse gas (GHG) regulations. We appreciate your views on this important matter. Now that more than a year has passed since EPA began to take regulatory actions to control GHG emissions, the Administrator asked that I update you on our progress.

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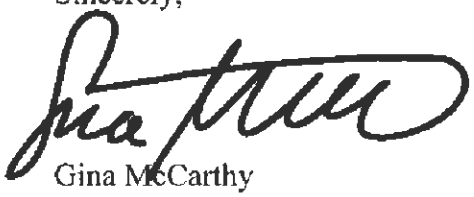

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Bill Schuette
Attorney General of Michigan
P.O. Box 30212
Lansing, Michigan 48909-0212

Dear Mr. Schuette:

Last year you and 21 of your colleagues in other states wrote to Administrator Lisa Jackson to express your concerns with the U.S. Environmental Protection Agency's greenhouse gas (GHG) regulations. We appreciate your views on this important matter. Now that more than a year has passed since EPA began to take regulatory actions to control GHG emissions, the Administrator asked that I update you on our progress.

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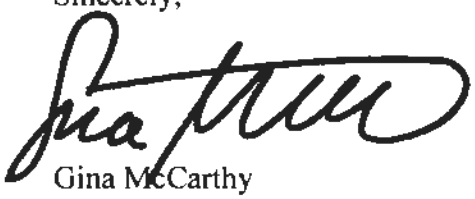

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Jon C. Bruning
Attorney General of Nebraska
P.O. Box 98920
Lincoln, Nebraska 68509-8920

Dear Mr. Bruning:

Last year you and 21 of your colleagues in other states wrote to Administrator Lisa Jackson to express your concerns with the U.S. Environmental Protection Agency's greenhouse gas (GHG) regulations. We appreciate your views on this important matter. Now that more than a year has passed since EPA began to take regulatory actions to control GHG emissions, the Administrator asked that I update you on our progress.

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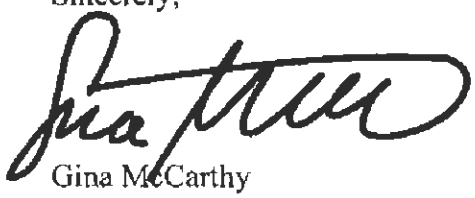

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Wayne Stenehjem
Attorney General of North Dakota
600 E. Boulevard Avenue
Bismarck, North Dakota 58505-0040

Dear Mr. Stenehjem:

Last year you and 21 of your colleagues in other states wrote to Administrator Lisa Jackson to express your concerns with the U.S. Environmental Protection Agency's greenhouse gas (GHG) regulations. We appreciate your views on this important matter. Now that more than a year has passed since EPA began to take regulatory actions to control GHG emissions, the Administrator asked that I update you on our progress.

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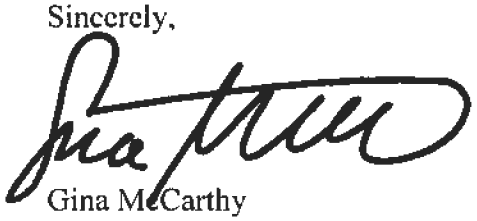

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Michael DeWine
Attorney General of Ohio
30 E. Broad Street
Columbus, Ohio 43266-0410

Dear Mr. DeWine:

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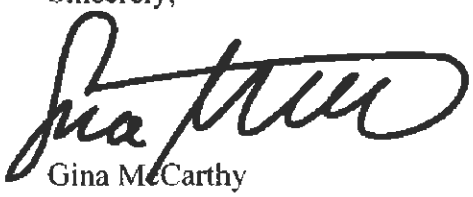

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable E. Scott Pruitt
Attorney General of Oklahoma
313 NE 21st Street
Oklahoma City, Oklahoma 73105

Dear Mr. Pruitt:

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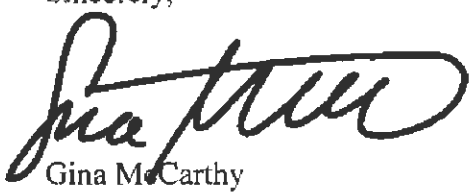

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable William H. Ryan, Jr.
Acting Attorney General of Pennsylvania
1600 Strawberry Square
Harrisburg, Pennsylvania 17120

Dear Mr. Ryan:

Last year you and 21 of your colleagues in other states wrote to Administrator Lisa Jackson to express your concerns with the U.S. Environmental Protection Agency's greenhouse gas (GHG) regulations. We appreciate your views on this important matter. Now that more than a year has passed since EPA began to take regulatory actions to control GHG emissions, the Administrator asked that I update you on our progress.

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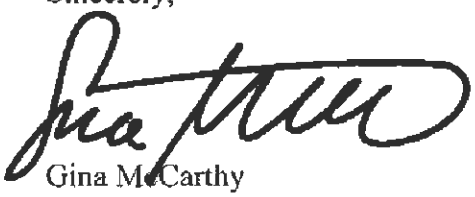

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Marty J. Jackley
Attorney General of South Dakota
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501

Dear Mr. Jackley:

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I hope this information is useful. If you have further questions, please contact me, or your staff may call Anthony Raia in EPA's Office of Congressional and Intergovernmental Relation at (202) 566-2758.

Sincerely,

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austn, Texas 78711-2548

Dear Mr. Abbott:

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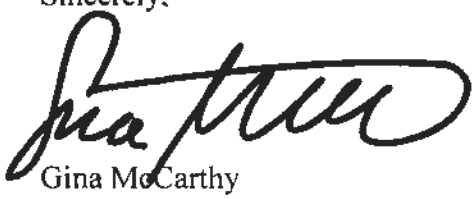

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Mark L. Shurtleff
Attorney General of Utah
State Capitol, Room 236
Salt Lake City, Utah 84114-0810

Dear Mr. Shurtleff:

Last year you and 21 of your colleagues in other states wrote to Administrator Lisa Jackson to express your concerns with the U.S. Environmental Protection Agency's greenhouse gas (GHG) regulations. We appreciate your views on this important matter. Now that more than a year has passed since EPA began to take regulatory actions to control GHG emissions, the Administrator asked that I update you on our progress.

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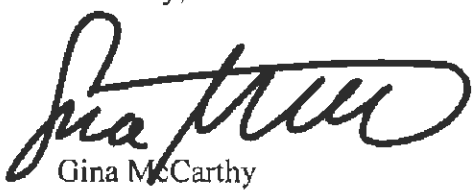

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Ken Cuccinelli
Attorney General of Virginia
900 East Main Street
Richmond, Virginia 23219

Dear Mr. Cuccinelli:

Last year you and 21 of your colleagues in other states wrote to Administrator Lisa Jackson to express your concerns with the U.S. Environmental Protection Agency's greenhouse gas (GHG) regulations. We appreciate your views on this important matter. Now that more than a year has passed since EPA began to take regulatory actions to control GHG emissions, the Administrator asked that I update you on our progress.

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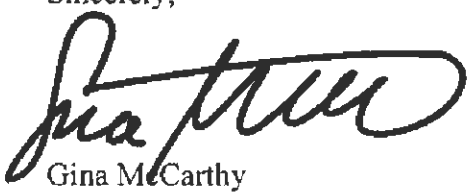

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Gregory A. Phillips
Attorney General of Wyoming
State Capitol Building
Cheyenne, Wyoming 82002

Dear Mr. Phillips:

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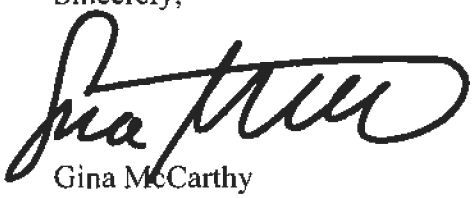

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 23 2012

OFFICE OF
AIR AND RADIATION

The Honorable Pam Bondi
Attorney General of Florida
The Capitol, PL 01
Tallahassee, Florida 32399-1050

Dear Ms. Bondi:

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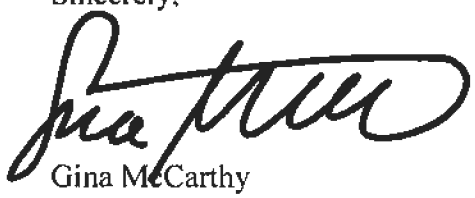

Gina McCarthy
Assistant Administrator

Incoming correspondence from control number AX-11-000-5313
Martha Faulkner to: Joseph Goffman 04/28/2011 04:10 PM
Cc: Sabrina Hamilton

Mr. Goffman, this is the second control that is in CMS that was reassign to you for a response. Please email your response back to me and Sabrina Hamilton when completed. The control number is shown above and the due date is 05/02/11. I will put a hard copy under your door. Thank You.

Martha H. Faulkner
NAHE SEE Program
Office of Air and Radiation-Correspondence Unit
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue, N.W. (6101-A), Room 5435
Washington, D.C. 20460
Tel: (202) 564-7417 Fax: (202) 501-0600

- 11-000-5313.pdf

AO440(Rev.12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Oklahoma

STATE OF OKLAHOMA EX REL. SCOTT PRUITT, in his official capacity as Attorney General of Oklahoma Plaintiff(s), v. LISA P. JACKSON, ADMINISTRATOR, in her official capacity as Administrator of the United States Environmental Protection Agency, Defendant(s).	)	Case No. CIV-11-605-F

2011 JUN -3 PM 1:28

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*
Lisa P. Jackson, Administrator Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) - or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12(a)(2) or (3) - you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:
Attorney General E. Scott Pruitt
Oklahoma Office of the Attorney General
313 NE 21st Street
Oklahoma City, Oklahoma 73105

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

SUMMONS ISSUED:

10:40 am, May 31, 2011

ROBERT D. DENNIS, Clerk

By: Kathy Rose
Deputy Clerk

Signed and sealed by the Clerk of the Court or Deputy Clerk.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA EX REL. SCOTT PRUITT, in his official capacity as Attorney General of Oklahoma, Plaintiff, v. LISA P. JACKSON, ADMINISTRATOR, in her official capacity as Administrator of the United States Environmental Protection Agency, Defendant.	Civil Action No. CIV-11-605-F

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff states the following for its Complaint:

FACTUAL BACKGROUND

1. In Section 169A of the 1977 Amendments to the Clean Air Act ("CAA" or "Act"), Congress enacted a program for protecting the nation's national parks and wilderness areas. Congress added Section 169B to the CAA (42 U.S.C. § 7491) in 1990 to address Regional Haze issues, and the U.S. Environmental Protection Agency ("EPA") promulgated regulations addressing Regional Haze in 1999, which are codified at 40 C.F.R. part 51, subpart P ("Regional Haze

Regulations"). The CAA and Regional Haze Regulations require, in part, that a State balance five factors and make a determination as to the Best Available Retrofit Technology appropriate for each qualifying facility regulated by the State (the "BART determination") and submit those determinations, along with other required elements, as state implementation plan ("SIP") revisions to EPA ("Regional Haze SIPs"). In connection with revisions to its regulations in 2005, EPA extended the deadline for States to submit their Regional Haze SIPs to EPA to December 17, 2007. 70 Fed. Reg. 39104 (July 6, 2005).

2. On January 15, 2009, EPA published in the Federal Register a rule finding that 37 states (including Oklahoma), the District of Columbia, and the U.S. Virgin Islands had failed to submit SIPs for EPA review and approval by the December 17, 2007 deadline. *Finding of Failure To Submit State Implementation Plans Required by the 1999 Regional Haze Rule,* 74 Fed. Reg. 2392 (January 15, 2009). In that published rule, EPA acknowledged that, pursuant to the requirements of 42 U.S.C. § 7410(c), its finding "starts a 'clock' for EPA to promulgate a [F]IP within two years." *Id.* EPA further acknowledged that "[i]f the state fails to submit the required SIPs [within two years] or if they submit SIPs that EPA cannot approve, then EPA will be required to develop the plans in lieu of the states." *Id.*

3. On February 19, 2010, the State of Oklahoma, through the Oklahoma Department of Environmental Quality (ODEQ), submitted to EPA the Oklahoma State Implementation Plan ("Oklahoma's Regional Haze SIP"). As of January 15, 2011, two years after EPA's two-year "clock" to either approve Oklahoma's Regional Haze SIP or promulgate a federal implementation plan ("FIP") in lieu of Oklahoma's Regional Haze SIP began to run, EPA had done neither.

4. Then, on March 22, 2011, more than two years after it acknowledged its two-year "clock" began to run, and more than a year after Oklahoma submitted the Oklahoma State Implementation Plan, EPA published a proposed rule in the Federal Register proposing to approve in part and disapprove in part Oklahoma's Regional Haze SIP. *Approval and Promulgation of Implementation Plans; Oklahoma; Regional Haze State Implementation Plan; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations*, 76 Fed. Reg. 16168 (March 22, 2011). In the same notice, EPA proposed a Federal Implementation Plan for Regional Haze ("Regional Haze FIP") to substitute for those portions of Oklahoma's Regional Haze SIP that EPA proposes to disapprove.

5. Despite the fact that EPA failed to take the action that it acknowledged it was "required" by law to take by January 15, 2011, EPA has nonetheless proceeded with the formal comment period and public hearing with

regard to the above-referenced proposed rule so that it may proceed with issuance of a final rule simultaneously disapproving in part Oklahoma's Regional Haze SIP and approving the Regional Haze FIP.

6. 42 U.S.C. § 7410(c)(1)(B), however, mandates that disapproval of all or part of the proposed Oklahoma Regional Haze SIP is a prerequisite to promulgation of a Regional Haze FIP. No such triggering event has occurred. In any event, EPA's promulgation of the proposed Regional Haze FIP for Oklahoma comes more than two years after its finding in January 2009 that the deadline for Oklahoma's submission of a Regional Haze SIP had passed.

NATURE OF THE ACTION

7. Pursuant to 42 U.S.C. § 7604(b)(2), Plaintiff commences this civil action against defendant Lisa P. Jackson in her official capacity as Administrator of EPA, based on the Administrator's failure to perform a nondiscretionary duty pursuant to 42 U.S.C. § 7410(c) of the CAA. Under the Act, the Administrator has a nondiscretionary duty to take final action on a Regional Haze SIP prior to promulgating a Regional Haze FIP for Oklahoma.

8. EPA and the Administrator also violated a nondiscretionary duty under the Act to honor the time constraints in Section 110(c) of the Act, 42 U.S.C. §7410(c), which limits the authority of EPA to propose a FIP to a two-year period after finding that a state missed the deadline to submit a SIP. On January 15, 2009,

EPA made such a finding with respect to Oklahoma's failure to submit a Regional Haze SIP. By proposing a Regional Haze FIP for Oklahoma on March 22, 2011, EPA acted outside the permissible timeframe established by the Act.

9. Oklahoma brings this civil action pursuant to 42 U.S.C. § 7604(b)(2) to compel the Administrator to perform her nondiscretionary duties. Oklahoma seeks declaratory and injunctive relief. Oklahoma seeks a declaration that EPA is in violation of the Act and an order directing EPA, through the Administrator, to take final action on the Oklahoma Regional Haze SIP or to take the actions necessary to re-open the two-year statutory window under 42 U.S.C. § 7410(c) prior to taking any action on a Regional Haze FIP for Oklahoma.

JURISDICTION AND VENUE

10. This is a citizen suit to enforce the Clean Air Act. Thus, this Court has jurisdiction over the subject matter of this action pursuant 42 U.S.C. § 7604(a)(2). The Clean Air Act is a federal statute, and defendant is an agent of the government of the United States. Thus, this Court also has subject matter jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question) and § 1346 (United States as a defendant). The Court is authorized to enter a declaratory judgment pursuant to 28 U.S.C. § 2201 and to grant injunctive relief pursuant to 28 U.S.C. § 2202.

11. Pursuant to 42 U.S.C. § 7604, plaintiff served timely prior notice on the Administrator of the acts and omissions complained of herein and of the State of Oklahoma's intent to bring the present action. Said notice was accomplished by certified letter addressed to the Administrator dated March 23, 2011, and a certified return receipt dated March 28, 2011.

12. Venue is proper in this district under 28 U.S.C. § 1391(e)(3) because no real property is involved in this action to compel the Administrator to perform a nondiscretionary duty.

PARTIES

13. The State of Oklahoma is a State of the United States of America with all rights and powers of a State under the United States Constitution.

14. E. Scott Pruitt, in his official capacity as Attorney General, brings this action on behalf of the State of Oklahoma as the chief law officer for the State of Oklahoma. In that capacity, he has a statutory duty to prosecute and defend all actions and proceedings in any federal court in which the State of Oklahoma is interested as a party. 74 O.S. § 18b(A)(I).

15. Defendant Lisa Jackson, in her official capacity as Administrator of EPA, is responsible for administering and enforcing the Act.

CLAIMS FOR RELIEF

CLAIM ONE

(Declaratory Judgment and Injunctive Relief)

16. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

17. Pursuant to 42 U.S.C. 7604(a)(2), any person may bring suit in federal district court against the Administrator of EPA "where there is alleged a failure of the Administrator to perform any act or duty which is not discretionary." 42 U.S.C. § 7602(e) defines "person" to include, *inter alia*, a State or political subdivision of a State."

18. An actual and justiciable controversy exists between the parties in this case. A declaratory judgment would serve a useful purpose in determining the parties' rights under the Act, while an injunction enforcing that declaratory relief would prevent the ongoing harm suffered by the State of Oklahoma as a result of EPA's failure to take final action on Oklahoma's Regional Haze SIP prior to promulgating a proposed Regional Haze FIP, which final action provides an important procedural safeguard to the State of Oklahoma by allowing for a comment period and public hearing on the disapproval of Oklahoma's Regional Haze SIP *prior* to the similar process which must be undertaken with regard to adoption of the Regional Haze FIP. EPA's deprivation of that procedural safeguard has injured the State of Oklahoma, and continues to injure the State of Oklahoma.

19. EPA has violated, and remains in violation of the Act, because it has promulgated a proposed Regional Haze FIP for Oklahoma prior to a final

determination disapproving all or a portion of the Oklahoma Regional Haze SIP. Such action by EPA is particularly improper here where EPA's proposed disapproval rests on EPA's attempt to usurp the authority granted to States by the CAA to make BART determinations. EPA should be enjoined from taking any further action with respect to the proposed Regional Haze FIP unless and until its proposed disapproval of portions of the Oklahoma Regional Haze SIP becomes final.

CLAIM TWO

(Declaratory Judgment and Injunctive Relief)

20. Plaintiff re-alleges and incorporates by reference all preceding paragraphs.

21. Pursuant to 42 U.S.C. 7604(a)(2), any person may bring suit in federal district court against the Administrator of EPA "where there is alleged a failure of the Administrator to perform any act or duty which is not discretionary." 42 U.S.C. § 7602(e) defines "person" to include, *inter alia*, a State or political subdivision of a State."

22. An actual and justiciable controversy exists between the parties in this case. A declaratory judgment would serve a useful purpose in determining the parties' rights under the Act, while an injunction enforcing that declaratory relief would prevent the ongoing harm suffered by the State of Oklahoma as a result of

EPA's promulgation of a Regional Haze FIP after the date on which it was required by law to do so. The State of Oklahoma has been injured, and continues to be injured by EPA's unlawful action, in that the EPA purports to displace Oklahoma's Regional Haze SIP with the untimely Regional Haze FIP.

23. EPA has violated, and remains in violations of, the Act because it has promulgated the proposed Regional Haze FIP for Oklahoma after the two-year deadline for it to do so under the CAA. As a result, EPA's proposed Regional Haze FIP for Oklahoma should be declared void, and EPA should be enjoined from taking any further action with respect to the proposed Regional Haze FIP for Oklahoma until it takes whatever actions are necessary to re-open the two-year statutory window for it to promulgate such a FIP.

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests that the Court:

(a) Declare that EPA and the Administrator have failed to perform a nondiscretionary duty pursuant to 42 U.S.C. § 7410(c)(1)(A) and 42 U.S.C. § 7410(c)(1)(B);

(b) Enjoin EPA and the Administrator from taking any further action on the Regional Haze's FIP prior to taking final action with respect to Oklahoma's SIP;

(c) Enjoin EPA and the Administrator from taking any further action on the Regional Haze FIP prior to taking such action as necessary to re-open the two-year statutory window for EPA to promulgate such a FIP;

(d) Award Plaintiff its costs and reasonable attorneys' fees; and

(e) Grant all other appropriate relief.

Date: May 31, 2011

Respectfully submitted,

s/ E. Scott Pruitt

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PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS. FOLD AT DOTTED LINE

CERTIFIED MAIL

91 7108 2133 3938 5569 3736

Lisa P. Jackson, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
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August 23, 2013

VIA CERTIFIED MAIL

Gina McCarthy
Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington DC 20460

Re: **Notice of Intent to Sue Pursuant to 42 U.S.C. § 7604(b)(2) for Failure to Grant or Deny Petition for Reconsideration**

Dear Administrator McCarthy,

Pursuant to 42 U.S.C. § 7604(b)(2) and 40 C.F.R. Part 54, Oklahoma Gas & Electric Company ("OG&E") is providing notice that it intends to file suit against you for a "failure of the Administrator [of the United States Environmental Protection Agency (EPA)] to perform an[] act or duty under this chapter which is not discretionary with the Administrator" within the meaning of the Clean Air Act. Specifically, EPA has a duty to grant or deny the petition for reconsideration and request for administrative stay ("Petition") that OG&E and the State of Oklahoma submitted for EPA's final rule published on December 28, 2011, titled "Approval and Promulgation of Implementation Plans; Oklahoma; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations." 76 Fed. Reg. 81,728 (Dec. 28, 2011) ("Final Rule").

OG&E and the State of Oklahoma submitted the Petition to EPA almost a year and a half ago, requesting that EPA grant reconsideration of two issues of central relevance that arose after the close of the public comment period. The issues requested for reconsideration are:

1) EPA's "overnight cost" approach to the cost effectiveness analysis under the Agency's Office of Air Quality Planning and Standards Control Cost Manual (Doc. ID No. EPA-R06-OAR-2010-0190-0060, dated January 2002), and

2) a "number of days" approach to visibility improvement.

The Petition also requested that EPA stay the Final Rule because the rule is contrary to applicable law and its implementation will cause irreparable harm to both the State of Oklahoma and OG&E. A complete copy of the Petition is included with this letter.

Pursuant to 42 U.S.C. § 7607(d)(7)(B), EPA is obligated to grant the Petition because OG&E and the State of Oklahoma have demonstrated that the objections raised in the Petition are of central relevance and arose after the close of the public comment period (but within the time specific for judicial review). Furthermore, the Administrative Procedure Act gives OG&E and the State "the right to petition for the . . . repeal of a rule[,]" 5 U.S.C. § 553(e), and requires EPA to resolve such petition "within a reasonable time." *Id.* at § 555(b). A delay of almost a year and a half in responding to the Petition filed by OG&E and the State of Oklahoma constitutes unreasonable delay of non-discretionary agency action. *See* 5 U.S.C. § 706(1); 42 U.S.C. § 7604(a). Therefore, OG&E intends to file suit within 60 days if EPA has not completed its duty by that time.

As required by 40 C.F.R. § 54.3, the person giving this notice is Oklahoma Gas & Electric Company, P.O. Box 321 Oklahoma City, Oklahoma 73101-0321, Telephone: (405) 553-3000. However, please direct all correspondence and communications regarding this matter to the undersigned counsel for OG&E.

Sincerely,

C T Wehland
CP

Charles T. Wehland
Counsel for OG&E

Enclosure

cc: Ron Curry
Administrator, EPA Region 6
1445 Ross Avenue
Suite 1200
Dallas, Texas 75202

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

STATE OF OKLAHOMA EX REL. SCOTT PRUITT, in his official capacity as Attorney General of Oklahoma, **and** **OKLAHOMA GAS AND ELECTRIC COMPANY** **Petitioners**	**EPA Docket #:** **EPA-R06-OAR-2010-0190**

PETITION FOR RECONSIDERATION AND REQUEST FOR ADMINISTRATIVE STAY

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ATTORNEYS FOR OKLAHOMA GAS & ELECTRIC COMPANY

PETITION FOR RECONSIDERATION
AND REQUEST FOR ADMINISTRATIVE STAY

Pursuant to Clean Air Act Section 307(d)(7)(B); 42 U.S.C. § 7607(d)(7)(B); 5 U.S.C. § 553(e); 5 U.S.C. § 705; and Fed. R. App. P. 18(a)(1), the State of Oklahoma, through the Attorney General acting on behalf of Gary Sherrer, Secretary of Environment, who is the duly appointed designee of Governor Mary Fallin ("Oklahoma" or the "State") and Oklahoma Gas & Electric Company ("OG&E") (together, Oklahoma and OG&E are referred to herein as "Petitioners") respectfully petition the U.S. Environmental Protection Agency ("EPA" or "Agency") for reconsideration and to grant an immediate administrative stay of the Federal Implementation Plan portion ("Oklahoma FIP" or "FIP") of the Agency's final rule published on December 28, 2011, titled "Approval and Promulgation of Implementation Plans; Oklahoma; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations." 76 Fed. Reg. 81,728 (Dec. 28, 2011) ("Final Rule").[1]

Reconsideration is warranted because in adopting the Final Rule, EPA raised and relied on for the first time (i) an "overnight cost" approach to the cost effectiveness analysis under EPA's Office of Air Quality Planning and Standards Control Cost Manual ("CCM") (Doc. ID No. EPA-R06-OAR-2010-0190-0060, dated January 2002), and (ii) a "number of days" approach to visibility improvement. Because these concepts were not raised in the proposed rule, Petitioners were deprived of an opportunity to address them during the comment period.

A stay of the Oklahoma FIP pending judicial review is warranted because the FIP establishes federally enforceable emission limits for the control of sulfur dioxide ("SO_2") for,

[1] Petitioners do not request a stay of the portion of the Final Rule that approved Oklahoma's BART determinations for particulate matter and nitrogen oxides at OG&E's Muskogee, Sooner and Seminole Generating Stations and for SO_2 at the Seminole Generating Station (Units 1, 2 and 3).

among others, four coal-fired electrical generating units ("EGUs") in Oklahoma that are operated by OG&E: Units 4 and 5 at the Muskogee Generating Station ("Muskogee Units") and Units 1 and 2 at the Sooner Generating Station ("Sooner Units") (collectively, the "OG&E Units"). The FIP is contrary to applicable law and its implementation at this time will cause irreparable harm to both the State of Oklahoma and OG&E. Not only does the FIP flout the Congressional mandate that States have the primary role in designing regional haze programs, it also undermines the State's goal of continuing the use of more environmentally friendly low sulfur coal, and will almost certainly lead to economic distress from higher electricity rates for all Oklahoma consumers, including the State and its agencies. Further, as the owner and operator of the OG&E Units, OG&E will be forced to immediately begin spending millions of dollars in order to meet the FIP's five-year compliance deadline, expenditures that may be wholly unnecessary depending on the outcome of Petitioners' legal challenges to the FIP.[2] Since these legal challenges are likely to succeed on the merits, and because a stay is in the public interest and necessary to prevent irreparable harm to Oklahoma, OG&E and OG&E's customers, EPA should grant Petitioners' request.

INTRODUCTION AND BACKGROUND

I. The OG&E Units

OG&E's affected Muskogee Units, located near Muskogee, Oklahoma, are two approximately 500 MW coal-fired generating units, and the Sooner Units, located near Red Rock, Oklahoma, are two approximately 500 MW coal-fired generating units. Affidavit of Ken Johnson ("Johnson Aff") ¶ 2, attached hereto as Ex. A. For more than a decade, OG&E has voluntarily burned very low sulfur coal at the OG&E Units in order to limit SO_2 emissions. (*Id.* ¶ 5.)

[2] In addition to filing this Petition with EPA, Petitioners are also filing petitions for review in the United States Court of Appeals for the Tenth Circuit, seeking review of those portions of the Final Rule that disapproved in part the Oklahoma SIP and that promulgated the FIP.

OG&E is Oklahoma's largest electricity provider and serves approximately 789,000 customers in 268 communities in Oklahoma and western Arkansas. OG&E's service area covers 30,000 square miles in Oklahoma and western Arkansas, including Oklahoma City, the largest city in Oklahoma, and Fort Smith, Arkansas, the second largest city in that state. (*Id.* ¶ 4.)

OG&E's load responsibility peak demand was over 6,500 MWs on August 3, 2011. OG&E's current generation portfolio has a combined capability of 6,753 MW, which includes intermittent wind generation capability of 449 MW. In 2011, coal-fired generation represented approximately 38 percent of OG&E's total generation capability, but produced almost 60 percent of the OG&E-generated energy. OG&E's 2,500 MW of coal-fired generation is operated as the primary baseload generation in its generation portfolio. (*Id.* ¶ 5.)

OG&E is a member of the Southwest Power Pool, Inc. ("SPP") Regional Transmission Organization ("RTO"). The OG&E Units serve as integral and essential generation resources within the SPP, and OG&E cannot meet its load responsibilities without those units. The North American Electric Reliability Corporation ("NERC"), certified by the Federal Energy Regulatory Commission ("FERC"), establishes and enforces reliability standards for the North American bulk electric system. SPP is the Regional Entity responsible for coordinating and promoting bulk electric system reliability in the region that includes Oklahoma, Arkansas, Kansas, Missouri, Nebraska, Texas, Louisiana, and New Mexico. NERC, FERC and the SPP continually monitor whether OG&E is complying with reliability standards, including maintaining generation to meet load plus reserves. (*Id.* ¶ 7.)

II. The EPA Rulemaking at Issue

In Section 169A of the 1977 Amendments to the Clean Air Act ("CAA" or "Act"), Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section establishes as a national goal the "prevention of any future, and the

remedying of any existing, impairment of visibility in mandatory Class I federal areas which impairment results from manmade air pollution." 42 U.S.C. § 7491(a)(1). However, Congress recognized that this program requires a delicate balance that considers the timing, cost and economic impact of alternative methods to achieve such goals. 42 U.S.C. § 7491(g)(1) ("In determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance . . . .").

Congress added Section 169B to the Act in 1990 to address regional haze issues, and in 1999, EPA promulgated regulations addressing regional haze, 70 Fed. Reg. 39,104 (July 6, 2005), which are codified at 40 C.F.R. part 51, subpart P ("Regional Haze Regulations" or "RHR"). In passing the regional haze statutory provisions, Congress made clear its intent to delegate significant power to States to develop, review, approve, and implement site-specific implementation plans designed to make reasonable progress in achieving regional haze goals while balancing each State's unique economic and power needs. *See, e.g.*, 123 Cong. Rec. 13,696, 13,709 (1977). EPA has recognized that, because the issues to be balanced are uniquely State and source specific, "the State must determine the appropriate level of BART control for each source subject to BART." 70 Fed. Reg. at 39,107.

The CAA and RHR set forth the process that must be followed in determining BART, but neither requires any specific outcome. Thus, the CAA and RHR require, in part, that a State balance five factors in making a BART determination for each qualifying facility: (i) the costs of compliance; (ii) the energy and non-air quality environmental impacts of compliance; (iii) any existing pollution control technology in use at the source; (iv) the remaining useful life of the source; and (v) the degree of improvement in visibility that may be expected as a result of such technology. 42 U.S.C. § 7491(g)(2); 40 C.F.R. § 51.308(e)(1)(ii). EPA recognizes that "States

are free to determine the weight and significance to be assigned each factor." Proposed Oklahoma BART Rule, 76 Fed. Reg. 16,168, 16,174 (Mar. 22, 2011) ("Proposed Rule"). EPA further acknowledges that "[i]n some cases, the State may determine that a source has already installed sufficiently stringent emission controls for compliance with other programs . . . such that no additional controls would be needed for compliance with the BART requirement." Original Regional Haze Regulations, 64 Fed. Reg. 35,714, 35,740 (July 1, 1999).

The RHR require States to submit their BART determinations, along with other required elements, as state implementation plan revisions to EPA for approval ("Regional Haze SIPs"). Regional Haze SIPs are approved where they meet all of the applicable requirements of the Act. 42 U.S.C. § 7410(k)(3). In this instance, that means that the emission limitations developed to address regional haze had to be developed pursuant to the evaluation process and balancing of factors set out in the CAA and RHR. 42 U.S.C. § 7491(b).

In 2005, EPA revised the RHR to comply with *American Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002), and extended the deadline for States to submit their Regional Haze SIPs to EPA to December 17, 2007. 70 Fed. Reg. 39,104. On January 15, 2009, EPA published in the Federal Register a finding that 37 states (including Oklahoma) had failed to submit SIPs to EPA by the December 17, 2007 deadline. Finding of Failure to Submit SIPs for Regional Haze, 74 Fed. Reg. 2,392 (Jan. 15, 2009). EPA acknowledged in this final rule that its finding "starts a 'clock' for EPA to promulgate a [F]IP within two years." *Id.* EPA further acknowledged that "[i]f the state fails to submit the required SIPs [within two years] or if they submit SIPs that EPA cannot approve, then EPA will be required to develop the plans in lieu of the states." *Id.*

Oklahoma, on February 17, 2010, through the then Oklahoma Secretary of the Environment, submitted to EPA its regional haze revisions to the Oklahoma State Implementation Plan ("Oklahoma SIP"). *See* Oklahoma SIP, Doc. ID No. EPA-R06-OAR-2010-

0190-0002. After properly balancing the statutory factors, Oklahoma determined that low sulfur coal constituted BART for the OG&E Units and proposed a SIP that would have made OG&E's continued use of that low sulfur coal a mandatory condition of operation. In balancing the BART factors, Oklahoma had before it both a 2008 cost analysis for the OG&E Units—one that both EPA and the Oklahoma Department of Environmental Quality ("ODEQ") had stated was prepared in conformity with the CCM[3]—and a 2009 cost analysis prepared at ODEQ's and EPA's request that was more robust and site-specific than the 2008 cost estimate prepared pursuant to the CCM. *See id.* Oklahoma concluded, based on this and other information, that scrubbers are not cost effective for the OG&E Units.

Nonetheless, on January 15, 2011, almost one year after Oklahoma submitted its SIP, EPA had neither approved it nor promulgated a FIP. Thus, EPA failed to meet its statutory deadline to reject the Oklahoma SIP or promulgate a FIP. It was not until March 22, 2011, more than two years after it acknowledged its two-year "clock" had begun to run, and more than one year after Oklahoma submitted to EPA its Regional Haze SIP, that EPA published a proposed rule in the Federal Register proposing to approve in part and disapprove in part the Oklahoma SIP. *See* Proposed Rule, 76 Fed. Reg. 16,168. In the same notice and without waiting for its proposed disapproval of parts of the Oklahoma SIP to become final—*i.e.*, without waiting for and considering public comments on its proposed disapproval of portions of the Oklahoma SIP—EPA proposed a FIP to substitute its judgment for the judgment of Oklahoma on certain key issues statutorily delegated to Oklahoma, including the BART determinations for the OG&E Units.

On May 23, 2011, both the State of Oklahoma and OG&E (among others) separately submitted extensive legal, policy, and technical comments to EPA opposing its proposed action

[3] *See* Final Rule, 76 Fed. Reg. at 81,744 ("The Control Cost Manual must be followed to the extent possible when calculating the cost of BART controls.").

likelihood of success. *See Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002) ("If the plaintiff can establish that the latter three requirements tip strongly in his favor, the test is modified, and the plaintiff may meet the requirement for showing success on the merits by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.") (internal citations and quotations omitted).

For the reasons described below, Petitioners satisfy the requirements for reconsideration and satisfy each of the stay factors. EPA should, therefore, open a reconsideration proceeding and grant a stay of the requirements of the Oklahoma FIP in the interest of justice pending completion of the reconsideration proceeding and/or judicial review of the FIP in the Tenth Circuit.

I. Petitioners Are Likely To Succeed on the Merits and Are Entitled to Reconsideration.

Because EPA relies on new concepts at the center of its arguments in support of the partial disapproval of the Oklahoma SIP and the promulgation of the FIP, Petitioners are entitled to reconsideration. In addition, because the Final Rule is flawed in several critical respects, as shown below, Petitioners' challenges to the Final Rule in the U.S. Court of Appeals for the Tenth Circuit are likely to succeed on the merits. EPA's errors range from fundamental legal misinterpretations and improper applications of its own rules governing BART determinations to flawed technical determinations underlying its SIP rejection and FIP promulgation. EPA should consider the number and severity of flaws Petitioners have identified in evaluating their likelihood of success on the merits. Even if EPA believes that it may ultimately be able to sustain its actions upon judicial review, the fundamental nature and extent of Petitioners' arguments themselves provide a compelling basis for a stay pending that judicial review.

A. The EPA illegally usurped authority Congress delegated to Oklahoma.

The CAA and RHR require that *States*, not EPA, have the primary role in implementing the regional haze program, including making BART determinations. *See, e.g.*, CAA § 169A(b)(2)(A), (g)(2), 42 U.S.C. § 7491(b)(2)(A), (g)(2) ("in determining [BART] *the state* (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration [the BART factors]") (emphasis added). EPA may disapprove a SIP and promulgate a FIP only where a State's SIP fails to meet minimum CAA requirements. 42 U.S.C. § 7410(k)(3); *see also Train v. Natural Res. Def. Council*, 421 U.S. 60, 79 (1975). The RHR and BART guidelines issued by EPA, 70 Fed. Reg. 39,104 (July 6, 2005), require only that States engage in the process of weighing the five statutory factors in determining BART for eligible sources in a manner consistent with the RHR. As the Oklahoma SIP clearly shows, Oklahoma did engage in that process in making its BART determinations for the OG&E Units.

Since ODEQ applied the statutory factors in promulgating the Oklahoma SIP, EPA cannot reject Oklahoma's BART determinations with respect to SO_2 emissions at the OG&E Units and promulgate a FIP substituting its judgment for that of the State. The U.S. Court of Appeals for the D.C. Circuit has affirmed that EPA's role in determining regional haze plans is limited, stating that the CAA "calls for states to play the lead role in designing and implementing regional haze programs." *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 2 (D.C. Cir. 2002). The Court reversed a portion of EPA's original RHR because it found that EPA's method of analyzing visibility improvements distorted the statutory factors and was "inconsistent with the Act's provisions giving the *states* broad authority over BART determinations." *Id.* at 8 (emphasis added); *see also Utility Air Group v. EPA*, 471 F.3d 1333, 1336 (D.C. Cir. 2006) (The second step in a BART determination "requires states to determine the particular technology that an individual source 'subject to BART' must install").

EPA's actions here ignore the plain language of the CAA and the courts' recognition of the States' dominant role in determining BART. EPA simply does not have the authority to disapprove the Oklahoma SIP merely because it disagrees with Oklahoma's choice in emission controls for specific sources. *See Train*, 421 U.S. at 79 (EPA has "no authority to question the wisdom of a State's choice of emission limitations if they are part of a plan which satisfies the standards of [the Act] . . . the Agency may devise and promulgate a specific plan of its own only if a [s]tate fails to submit an implementation plan which satisfies those standards.").

EPA's only basis for suggesting that Oklahoma deviated from its guidelines is the assertion that the 2009 site-specific cost estimates did not comply with the CCM. This foundation is fundamentally flawed in at least two respects. First, EPA ignores OG&E's 2008 cost estimates, which EPA and ODEQ both acknowledged were calculated in accordance with the CCM. Instead, EPA focuses solely on and criticizes the 2009 site-specific cost estimates for not complying with the CCM. In fact, however, the 2009 cost estimates did use the categories of costs identified in the CCM, but at EPA's and ODEQ's request, went beyond the assumed CCM values to provide site specific, vendor-supported cost estimates for the BART analysis. EPA rejected significant portions of the 2009 site-specific costs estimates primarily because it found that deviations from the CCM were not adequately documented or supported, and in many instances it assumed this resulted in substantial double counting of expenses. While OG&E disputes EPA's conclusion regarding the 2009 cost estimates, the proper response by EPA once it reached that conclusion should have been to return to the 2008 cost estimates, which both EPA and ODEQ had stated complied with the CCM. EPA's attempt to create a hybrid cost estimate by selectively modifying the 2009 estimate resulted in cost estimates that were neither site-specific and real (like OG&E's 2009 cost estimates) nor pursuant to the CCM (like OG&E's

2008 cost estimates). EPA's approach to the cost estimates for the OG&E Units was, therefore, arbitrary and capricious.

Second, even if only the 2009 cost estimates were used to evaluate the cost effectiveness of scrubbers, Oklahoma's reliance on those site-specific estimates was proper. EPA's contrary conclusion is flatly inconsistent with its own recognition that "States have flexibility in how they calculate costs." 70 Fed. Reg. at 39,127. Where the RHR give States flexibility and Congress has designated those States to take the dominant role in determining BART, EPA is not free to undercut the State's reasonable exercise of that flexibility.

EPA illegally usurped State authority in violation of the plain language of the Act when it rejected Oklahoma's BART determination for the OG&E Units and, thus, the FIP is unlawful.

B. EPA improperly proposed a FIP prior to taking final action on the Oklahoma SIP and after the two-year window for promulgating a FIP under the CAA.

EPA's issuance of the Oklahoma FIP was also procedurally defective. First, the CAA does not give EPA authority to propose a FIP prior to final disapproval of the Oklahoma SIP. The Act, moreover, requires that EPA give Oklahoma a reasonable opportunity to cure any alleged defects in a disapproved SIP. CAA Section 110(c)(1)(A) allows promulgation of a FIP after EPA "finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under section (k)(1)(A) of this subsection or . . . disapproves a State implementation plan submission in whole or in part." 42 U.S.C. § 7410(c). Section 110(c) also states that EPA shall propose a FIP "unless the state corrects the deficiency," thereby reflecting Congress's intention for States to have the power to design their own SIP and have an opportunity to correct a SIP before a FIP is issued. *Id.* Simultaneous promulgation of the FIP is also inconsistent with the Act's definition of a FIP. A FIP is defined as a plan "to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation

plan." 42 U.S.C. § 7602(y). Thus, a FIP cannot properly exist until after final action has been taken on a State's SIP.

CAA § 307(d)(3) also requires that "[t]he statement of basis and purpose" that must accompany each proposed FIP include a summary of "the factual data on which the proposed rule is based" and "the major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3)(A), (C). EPA cannot credibly claim to be able to present the relevant factual, legal, and policy information and rationale to justify a proposed FIP before it has: (1) determined whether and to what extent the Oklahoma SIP may be deficient and unapprovable; (2) provided the public with an adequate explanation of any such determination in a proposed EPA rule on SIP approval or disapproval that is published for public review and comment; (3) received, considered, and responded to public comments on the proposed action; and (4) made a final determination and taken final action to disapprove the SIP in whole or in part.

By intermingling its justification for rejecting Oklahoma's SIP with its stated grounds for promulgating a FIP, EPA attempts to side-step its burden of proof to justify a rejection of Oklahoma's BART determinations. For example, in making its BART determinations, ODEQ concluded that the site-specific cost information submitted by OG&E in 2009 was "credible, detailed, and specific for the individual facilities," going "well beyond the default methodology recommended by EPA guidance." Oklahoma SIP at § VI(C). EPA, however, rejected a number of site-specific costs that Oklahoma agreed with, such as labor productivity, overtime inefficiencies, and owner's costs, concluding that they were "likely" included in other areas. *See* Response to Technical Comments for Sections E through H, EPA ID No. EPA-R06-OAR-2010-0190-0057 (dated Dec. 13, 2011) ("Response to Comments"). EPA's speculations, however, do not satisfy its burden to demonstrate that Oklahoma failed to engage in the process specified by

the CAA and RHR.[4] It also does not mean that *Oklahoma*, as the primary decision-maker for BART, acted unreasonably in the way it included these costs in its analysis. EPA's speculative approach is irrelevant to the issue of whether Oklahoma considered and balanced the required BART factors. By combining the review of the Oklahoma SIP and the promulgation of the Oklahoma FIP, EPA blurs the important distinction in the scope of its authority with respect to the cost analysis, contrary to the regime established by the CAA.

To the extent the simultaneous promulgation of the Oklahoma FIP was driven by the perceived consent decree deadline in *WildEarth Guardians v. Jackson*, No. 4-09-CV-02453-CW (N.D. Cal. 2009), that only serves to buttress the procedural errors committed by EPA. It demonstrates that EPA rushed a FIP for reasons unrelated to the CAA or RHR without giving the Oklahoma SIP and the comments on its Proposed Rule fair and due consideration.

Second, because EPA published a notice that States, including Oklahoma, had failed to meet the statutory deadline for submitting regional haze SIPs, it is undisputed that the CAA unequivocally imposes a two-year requirement for EPA to take such action. *See* 42 U.S.C. § 7410(c); *General Motors v. United States*, 496 U.S. 530, 537 (1990) (citing CAA § 110(c) as example of "explicit deadlines" established by the CAA). It is also undisputed that EPA failed to promulgate a FIP within that two-year window. Thus, EPA's attempt to promulgate the Oklahoma FIP outside that two-year window, without first providing a new notice to re-open the two-year window for doing so, was contrary to the Act.

[4] As another example, EPA "assumes" a 5% "multiple unit discount," without any showing that such a discount was not already reflected in the vendor quotes in the 2009 cost estimates or, more importantly, that such a discount would likely be achievable. Again, while EPA may be able to include such a discount for purposes of its own cost analysis in proposing a FIP, EPA has no basis to reject the Oklahoma SIP based on such speculation or Oklahoma's reasonable conclusion that OG&E's cost estimates were sufficiently detailed and credible for purposes of the Oklahoma SIP.

C. EPA's rejection of the 2008 and 2009 cost estimates is arbitrary and capricious.

As previously noted, Oklahoma has the primary authority to determine BART and, pursuant to EPA's own guidelines, this primacy extends to the cost analysis, where the State is given "flexibility in how [it] determines costs." 70 Fed. Reg. at 39,127. Oklahoma's cost analysis, set forth in the Oklahoma SIP, clearly meets statutory requirements. Even if EPA was authorized to second guess Oklahoma's judgment, EPA has not articulated any sound or reasonable basis for rejecting Oklahoma's considered judgment regarding the appropriate costs to consider. Indeed, EPA's own cost analysis is internally inconsistent, arbitrary, speculative and unsound.

1. EPA's failure to accept the 2008 cost estimate is unjustified.

In May 2008, OG&E submitted BART evaluations, including cost estimates for installing and operating scrubbers at the OG&E Units, which were prepared according to the CCM. In November 2008, EPA sent a letter to ODEQ in which EPA acknowledged that "OG&E did utilize the 'EPA Air Pollution Control Cost Manual' when constructing its [May 2008] cost estimates." *See* OG&E Comment, Ex. A; *see also* Oklahoma SIP, App. 6-4. The 2008 cost estimates showed that the costs of scrubbers per ton of SO_2 removed for the OG&E Units would be more than ten times the average costs per ton expected by EPA for this technology and nearly five times as much as the upper limit of EPA's expected cost range. *See* 70 Fed. Reg. at 39,132 (estimating an average cost of $919 per ton and a cost range of $400 to $2,000 per ton of SO_2 removed).

After the 2008 estimates were finalized and updated in September 2009,[5] EPA and ODEQ asked for vendor quotations and other site-specific information to supplement and address questions regarding the outcome of the prior CCM analysis. OG&E complied with the

[5] The 2008 cost estimates were updated in September 2009 to reflect the use of annual actual baseline emissions for the 2004-2006 periods, as required by EPA, but this did not alter the total annual costs of control contained in the original May 2008 estimates.

request for information and detail beyond that required by the CCM and submitted site-specific cost estimates in December 2009. Although OG&E used the cost categories prescribed by the CCM to develop the 2009 cost estimates, their site-specific nature meant that they could not achieve the CCM's primary objective of national comparability for costs of control equipment at one facility to costs of similar equipment at another facility, a fact which OG&E pointed out in its comments to the proposed Oklahoma SIP. *See* OG&E Comment at 25.

Under these circumstances, it is clear that EPA's rejection of the 2009 estimates for allegedly failing to follow the CCM is arbitrary and designed to achieve its predetermined judgment that scrubbers should be specified as BART for the OG&E Units. Not only does EPA's decision rest on a faulty analysis of the 2009 cost estimates, as discussed below, but EPA completely and improperly ignored the 2008 cost estimates that, in full accordance with the CCM (as even EPA admitted), independently demonstrated that scrubbers are not cost effective. EPA's inconsistent positions regarding the nature of the cost estimates necessary for the BART analysis for the OG&E Units illustrates the arbitrariness of the Final Rule.

2. EPA's Option 1 disregarded the BART guidelines by failing to use baseline actual emissions to determine cost effectiveness.

Pursuant to EPA's own guidance, which Oklahoma was required to follow, the amount of a pollutant that a device will control on an annual basis must be determined using past actual emissions from the source and projections of future emissions following installation of a particular control technology. The purpose of using past actual emissions as the baseline is to provide a realistic depiction of the amount of a pollutant that a device will actually control. 70 Fed. Reg. 39,167. EPA has, in fact, revised cost effectiveness calculations in other BART determinations to ensure that emission reductions are calculated this way. *See, e.g.*, 74 Fed. Reg. 44,313, 44,321 (Aug. 28, 2009). Use of this consistent calculation methodology helps to achieve the national uniformity that EPA seeks in the regional haze context.

EPA argues in the Final Rule that the "RHR states that when differences from 'past practice' have 'a deciding effect in the BART determination, you must make these parameters or assumptions into enforceable limitations,' and the OG&E analysis does not propose making the basis of their reductions enforceable." Response to Comments at 6. EPA's argument misses the mark in two significant ways. First, EPA is simply wrong that the emissions reductions used as the basis for OG&E's calculations are not made enforceable. To the contrary, the Oklahoma SIP finds that low sulfur coal is BART and specifically requires OG&E to continue burning that fuel in the future. Accordingly, OG&E's analysis (unlike EPA's) represents the real actual emission reductions that could be expected with the controls installed. EPA's contrary argument is circular and nonsensical.

Second, EPA's argument reflects the flawed assumption at the heart of EPA's Option 1, *i.e.*, that one must combine the OG&E-sized unit with higher sulfur coal or there is a mismatch. It is that fundamental engineering error that leads EPA – not OG&E or Oklahoma – to depart from past practices and *assume* that OG&E burns a much higher sulfur coal than it actually does (thereby removing more SO_2 and lowering the $/ton of pollutant removed). Moreover, even if OG&E did switch to a higher sulfur coal following scrubber installation, that would be irrelevant to a proper cost analysis. Cost effectiveness is based on the amount of SO_2 reduction when comparing emissions pre- and post-control. For example, if an emitter emits 10,000 tons per year ("tpy") of SO_2 pre-control and 2,000 tpy of SO_2 post control, the amount of SO_2 controlled is 8,000 tpy because that is the reduction in pre-control emissions. The reduction in pre-control emissions remains the same even if a scrubber actually captures 18,000 tpy of SO_2 because the emitter burns a higher sulfur coal following control installation. The sulfur content of a particular coal is simply irrelevant to a proper cost analysis.

3. EPA's Option 2 demonstrates a profound lack of engineering judgment and skill.

EPA disregarded sound engineering principles by reducing the scrubber size in Option 2. This fundamental error reflects EPA's lack of understanding of the engineering and operational processes at issue. Scrubber size is dependent upon gas flow, not the sulfur content of a particular coal. A scrubber must be sized to reflect the maximum potential heat input from the facility, and that number is essentially the same whether a facility burns high or low sulfur coal. The reduced scrubber size reflected in EPA's Option 2 is not technically feasible and, if used, would effectively de-rate the OG&E facilities by significantly diminishing their electrical generating capacity, thereby impeding their ability to meet the supply requirements for OG&E's customers and for the SPP. Option 2, therefore, is not a valid analysis because EPA guidance requires the elimination of technically infeasible options. *See* 40 C.F.R. Pt. 51, App. Y(II)(A); Proposed Regional Haze Regulations, 69 Fed. Reg. 25,184, 25,186 (May 5, 2004).

4. EPA's paid consultant is not qualified to opine on the cost effectiveness of scrubbers at the OG&E facilities.

EPA's reliance on Dr. Phyllis Fox for its cost analysis is due no deference here because she, unlike Sargent & Lundy ("S&L") who worked with OG&E in the preparation of its cost estimates,[6] is not qualified and lacked foundation to analyze the engineering requirements of a retrofit scrubber system at the OG&E Units. Dr. Fox's conclusions are unreliable because she lacks the knowledge, skill, experience, training, and education to proffer opinions on the projected costs and visibility impact of installing and operating scrubbers at the OG&E Units. She has never designed, installed, or operated a scrubber and has never visited the OG&E Units.

[6] S&L, unlike Dr. Fox, is well qualified to perform the cost analysis for the Muskogee and Sooner Units. S&L has decades of experience providing comprehensive consulting, engineering, design, and analysis for electric power generation, specifically in the area of retrofit and environmental compliance projects. To develop both the 2008 and 2009 cost estimates, S&L reviewed OG&E data and information in detail to gain an understanding of the facilities. As part of this effort, S&L engineers visited the Muskogee and Sooner Generating Stations numerous times so as to understand the specific design and engineering aspects of the affected units and the overall facilities.

While Dr. Fox's curriculum vitae reflects her experience as a consultant and witness on various environmental litigation topics, including permitting and condemnation cases, her vitae establishes her lack of experience evaluating the costs of installing and operating pollution control equipment, let alone as retrofit technology at EGUs. Dr. Fox is not qualified, and certainly not more qualified than OG&E or Oklahoma, to properly evaluate the cost effectiveness of scrubbers at the OG&E Units.

Dr. Fox's analysis, adopted and endorsed by EPA in the Final Rule, also lacks adequate foundation. Dr. Fox concedes throughout her report that she lacked information relied on by ODEQ to reach its conclusions, but nonetheless she offered opinions contrary to those conclusions. For example, she acknowledged that because she did not see the parties' spreadsheets disclosing cost calculations, she was unable to perform a complete analysis. *See* Response to Comments at 13. Dr. Fox also appeared to lack relevant knowledge about the OG&E Units and the facilities at which these units are located. Dr. Fox did not attempt to meet, or even communicate, with OG&E or S&L about the particular design parameters, engineering specifications, or other intricacies associated with the OG&E Units. Indeed, Dr. Fox did not visit either the Muskogee or Sooner Generating Stations. Because Dr. Fox was admittedly missing information that is vital to a complete and accurate analysis, her analysis is without sufficient foundation and unreliable, and EPA's reliance on that analysis was arbitrary and capricious.

5. EPA has failed to show that Oklahoma did not follow CCM guidelines in evaluating the 2009 cost estimates, relying for the first time in the Final Rule on the "overnight cost" method.

In analyzing EPA's approach to the cost analysis for the OG&E Units, EPA's disapproval of portions of the Oklahoma SIP and EPA's promulgation of the Oklahoma FIP must be considered separately. Unless EPA was justified in rejecting the SO_2 portions of the Oklahoma SIP for the OG&E Units, it had no authority to issue the FIP. Thus, for purposes of reviewing

EPA's action with respect to the Oklahoma SIP, EPA's evaluation of specific cost factors as part of its promulgation of the Oklahoma FIP is irrelevant. The issue is whether Oklahoma's approach in devising the SIP comported with the statutory requirements. Fundamentally, of course, Oklahoma's conclusion that scrubbers were not cost effective is fully supported by the 2008 cost estimates, which EPA conceded were developed consistent with the CCM but refused to consider in connection with the disapproval of the SIP. Even with respect to the 2009 site-specific cost estimates, a review of the Oklahoma SIP demonstrates that ODEQ's consideration of those costs was justified and reasonable. Given Congress's deference to the States to make these judgments, the issue should be settled.

EPA, however, attacks Oklahoma's judgment, asserting that Oklahoma did not apply the so-called "overnight" cost method—a method not previously referred to or applied by EPA in connection with the Proposed Rule, in other BART determinations, or in the context of the RHR. *See* 76 Fed. Reg. at 81,744. EPA's failure to raise this approach as justification for its proposed actions in the Proposed Rule deprived Petitioners of the right and opportunity for comment and was, therefore, improper under the APA. The cost of scrubbers, and the method of determining those costs, are at the core of EPA's Final Rule, both in disapproving the Oklahoma SIP and in justifying the requirements of the Oklahoma FIP. Thus, reconsideration is appropriate.

Contrary to EPA's assertion, the CCM does not require parties to use the "overnight" cost method, and EPA candidly admits that the CCM never uses the terminology "overnight cost." *See* Response to Comments at 9. Indeed, in support of the Proposed Rule, EPA claimed that the CCM required compliance with a "constant dollar" approach, which was (as explained in the OG&E Comment) the method utilized in the 2009 site-specific cost estimates. *See* Revised Cost Effectiveness Analysis for Flue Gas Desulfurization, Doc. ID No. EPA-R06-OAR-2010-0190-

0006, dated Oct. 6, 2010, at 9-12. The constant dollar methodology allows comparability by removing the effects of inflation.

EPA's newly minted phraseology is inconsistent with the CCM, its own past regulatory practices, and the BART cost effectiveness analysis of others. It represents an entirely new approach to calculating costs for purposes of RHR BART determinations. For example:

- Rather than an "overnight cost" analysis, the constant dollar approach required by the CCM annualizes (in constant dollars) the costs of installation, maintenance, and operation of the air pollution control device over the life of the system, and the CCM recommends translating the costs in each future year to year zero using an equivalent uniform annual cash flow method. The 2009 cost estimates followed this approach.

- Section 2.3 of the CCM sets forth cost categories that specifically include "total capital investment." Total capital investment is defined to "include *all* costs required to purchase equipment needed for the control systems . . . ." (emphasis added). *See* CCM, Doc. ID No. EPA-RO6-OAR-2010-0190-0060.

- Sections 2.4.1 and 2.4.2 of the CCM address accounting for the time value of money, and real, nominal and social interest rates, stating that "removing the inflation adjustment from the nominal interest rate yields the real rate of interest – the actual cost of borrowing." *Id.*

- While EPA cites to the U.S. Energy Information Administration ("EIA") as presenting projected plant costs in terms of overnight costs in its Response to Comments, this is not accurate. The EIA document cited by EPA states that "[e]stimates of the overnight capital cost of generic generating technologies *are only the starting point for consideration of the cost of new generating capacity in EIA modeling analyses.*" EIA Updated Capital Cost Estimates for Electricity Generation Plants, dated Nov. 2010, at 4 (available at http://www.eia.gov/oiaf/beck_plantcosts/pdf/updatedplantcosts.pdf). Footnote 2 of the EIA document states in full: "'Overnight cost' is an estimate of the cost at which a plant could be constructed assuming that the entire process from planning through completion could be accomplished in a single day. This concept is useful to avoid any impact of financing issues and assumptions on estimated costs. *Starting from overnight cost estimates, EIA's electricity modeling explicitly takes account of the time required to bring each generation technology online and the costs of financing*

construction in the period before a plant becomes operational." *Id.* at 2 (emphasis added).

- Not only is the CCM silent as to the "overnight cost" approach trumpeted for the first time here by EPA, but to the contrary, the CCM recognizes that "utilities ... generally employ a process called 'levelized costing' that is different from the methodology used here." *See* CCM Sec. 1.1 n.1. Unlike the "overnight cost" method, the "levelized costing" approach is consistent with the "constant dollar" approach employed by OG&E.

- Although EPA claims that it has long been its practice to exclude AFUDC from regulatory cost effectiveness analysis, EPA's website indicates that "EPA uses the Integrated Planning Model (IPM) to analyze the projected impact of environmental policies on the electric power sector in the 48 contiguous states and the District of Columbia." (http://www.epa.gov/airmarket/progsregs/epa-ipm/) EPA further notes that "IPM can be used to evaluate the cost and emissions impacts of proposed policies to limit emissions of sulfur dioxide (SO2), nitrogen oxides (NOx), carbon dioxide (CO2), and mercury (Hg) from the electric power sector." *Id.* As part of the calculation of the capital cost factor, the IPM "increase[s costs] by another 10% to build in an Allowance for Funds used During Construction (AFUDC)" over a 3 year construction cycle. *Documentation for EPA Base Case v.4.10 using the Integrated Planning Model*, EPA #430R10010, Section 5.1.1 (August 2010).

- While EPA claims that the CCM requires use of the "overnight method" for comparability purposes, the reality is that EPA has not required application of the "overnight method" in connection with any other RHR BART cost effectiveness evaluations. Instead, prior to issuing the FIP, EPA consistently maintained that the CCM requires use of the "constant dollar" approach to estimating costs. *See, e.g.*, Technical Support Document for EPA's Proposed Action on North Dakota's Regional Haze and Transport State Implementation Plans, EPA Docket ID No. EPA-R08-OAR-2010-046-0076, dated Sept. 2011, attached hereto as Ex. B.

With respect to its treatment of owner's costs, engineering and procurement costs, and contingency, EPA does not argue that these costs are not allowable under either the "overnight cost" method or the constant dollar approach. Instead, EPA speculates that they must already be included in other cost numbers. *See* Response to Comments at 28-30. EPA has no basis—and states no basis—for saying that Oklahoma was not reasonable or justified in determining that the

3, 24, available at ftp://ftp.epa.gov/r8/regionalhaze/ColstripAddendum.pdf), combined and attached hereto as Ex. D.[7]

EPA's selective reliance on industry publications (rather than the CCM) and its inexplicable departure from past practices in calculating the useful life for the OG&E Units is arbitrary and capricious. Moreover, EPA has no sound technology based reason to reject ODEQ's determination that a 20-year useful life for the controls on the OG&E Units, made in accordance with the CCM and other guidance.

In the end, EPA has not and cannot show that Oklahoma's cost analysis is inconsistent with CCM guidelines. The CCM itself recognizes that states have flexibility in the cost analysis employed, and Oklahoma appropriately exercised that flexibility.[8] Whether EPA would have exercised its judgment differently does not justify its disapproval of the Oklahoma SIP.

6. EPA's "visibility improvement" analysis employs a new "number of days" approach to visibility improvement.

EPA's visibility improvement analysis in the Final Rule, for the first time, reflects a "number of days" approach to visibility improvement. 76 Fed. Reg. at 81,736. Again, because this approach was not raised by EPA in the Proposed Rule, Petitioners are entitled to reconsideration. Moreover, EPA does not and cannot suggest that this new approach is required by published EPA guidance or the CAA. In contrast, EPA acknowledges that the $/deciview metric used by Oklahoma in the Oklahoma SIP is an optional cost effectiveness measure that can be used consistent with BART guidelines. *Id.* at 81,747. In short, EPA has no proper basis under the Act to reject Oklahoma's reasoned judgment to consider the $/deciview metric consistent with BART guidelines and to substitute an entirely new and different metric for the

[7] *See also* Letter from Callie A. Videtech, Director, Air and Radiation Program, to James Parker, Manager, Compliance Services (Corette Generating Station), at 3, available at www.epa.gov/region8/air/pdf/coretteepaltr.pdf, included in Ex. D.

[8] As is apparent from the discussion above of EPA's approach to just some of the cost items, EPA's cost analysis reflects the procedural flaw that EPA has created by failing to first address the Oklahoma SIP before trying to justify its own analysis for purposes of a FIP.

first time in the Final Rule. EPA's action once again is not only defective procedurally under the APA, but demonstrates the impropriety of commingling its SIP review and FIP promulgation, resulting in EPA failing to provide the statutorily required deference to Oklahoma. EPA further compounded this error by failing to provide an analysis of the SIP controls using the new FIP metric. As a result, it is impossible to determine how much visibility improvement is attributable to scrubbers and how much is attributable to the use of low sulfur coal.

For each of the foregoing reasons, the Final Rule is invalid, Petitioners are entitled to reconsideration, and Petitioners are likely to succeed on the merits of their challenges.

II. Petitioners Will Suffer Irreparable Harm Absent a Stay

EPA's FIP became effective on January 27, 2012 and requires compliance with the established emission limits through the installation of four scrubbers (the "Scrubber Project") within five years—by January 27, 2017.

A. The State faces irreparable harm without a stay.

As noted above, Congress designated the State as the principle decision maker for BART determinations and regional haze programs. EPA's actions here deprive Oklahoma of the ability to fashion a regional haze program that balances costs and visibility improvement in a manner that is appropriate for the citizens and economy of this State. Compelling OG&E to proceed while the Court of Appeals reviews EPA's actions here undermines the State's authority and damages the ability of Oklahoma to fulfill its regulatory function as created by Congress. OG&E has detailed—and the State has agreed with—the immediate and short term economic costs resulting from the need to meet the existing five-year compliance deadline. To the extent those costs are passed through to consumers in Oklahoma, the increased electricity rates will have an adverse economic impact throughout Oklahoma, as consumers pay higher rates directly and businesses look to pass their higher costs through to their customers. As a large electricity

consumer, the State too will feel the economic impact of higher rates directly. Neither the State nor its citizens has recourse for such unnecessary costs.

B. OG&E faces irreparable harm without a stay.

The compliance deadline established in the Oklahoma FIP places OG&E in an untenable position. OG&E cannot wait until its judicial challenge to the Final Rule has been finally determined before commencing the Scrubber Project because OG&E could not, under those circumstances, meet EPA's five-year compliance deadline. Rather, OG&E must undertake immediate steps to procure the goods and services necessary to implement the Scrubber Project or risk non-compliance. The end result is that OG&E and its customers will incur significant costs associated with the FIP. However, these costs are not recoverable from EPA if the Final Rule is ultimately found to be invalid. Thus, OG&E will suffer irreparable harm if the FIP's compliance deadlines are not stayed pending judicial review.

As noted above, the APA specifically provides that an agency may postpone the effective date of an agency action pending judicial review. 5 U.S.C. § 705. Courts, when considering a stay of agency action pending judicial review, apply the same test as that applied to a motion for preliminary injunction. *Corning Savings & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 562 F. Supp. 279, 280 (E.D. Ark. 1983). One component of this test for injunctive relief is irreparable harm and the inadequacy of legal remedies. *Sampson v. Murray*, 415 U.S. 61, 88 (1974). Courts evaluate three factors when evaluating the harm that will occur, both if the stay is granted or not: (1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided. *Cuomo v. United Nuclear Regulatory Comm'n*, 772 F.2d 972, 997 (D.C. Cir. 1985). As further discussed below, OG&E will suffer irreparable harm if the FIP compliance deadlines are not stayed pending judicial review.

The Scrubber Project will be a massive construction effort requiring extensive planning and logistical coordination. Johnson Aff. ¶ 9. OG&E's engineering consultants have performed cost estimates demonstrating that the cost of the Scrubber Project will range between $1.2 billion and $1.5 billion, with a resultant increase in annual Operating & Maintenance costs of between $70 million and $150 million. *Id.* Certainly if scrubbers must be installed on four separate units at two generation stations, the timing of the installation will need to be coordinated to ensure that OG&E can meet its load requirements during the protracted construction period when the units under construction will not be available to generate electricity. Because of this need to stagger the construction interruption for each of the four units, OG&E must begin promptly the steps necessary to comply with the FIP. Indeed, OG&E would have to immediately commence permitting efforts and the contracting process for engineering, equipment fabrication, and construction. Site mobilization for construction activities on the first unit would need to begin no later than October 2013. Activities that will necessarily have to occur in the first 24 months include:

- preparing design criteria, developing preliminary equipment general arrangement and site arrangement drawings, and engineering studies;
- developing system specification for bid, bid period, evaluation, selection, and negotiation of contract(s);
- initiation of air permit modifications, and other permits related to FGD system;
- detailed engineering for ductwork design, piping, electrical, substructure, and preliminary piping and instrumentation diagrams;
- equipment procurement for baghouse, booster fans, switchyard upgrades, ductwork, structural steel, auxiliary transformers, switchgear, control system, and dampers;
- commencement of manufacturing/fabrication;
- general work contracts; and

- site mobilization and preparatory work to construct/install equipment at the physical site of the first scrubber installation.

Costs for activities during the first year are estimated at 3% of total project and second year costs are estimated at 14% of total project. Thus, OG&E will have expended, in good faith, as much as $30 million dollars in the first year alone, and another $200 million if extended through two years, preparing for the installation of scrubbers.

It is apparent that the Scrubber Project will result in very significant capital investment costs, some of which OG&E will seek to recover from its customers. This recovery will impact OG&E's energy rates and therefore, necessarily, the size of its customers' monthly bills. OG&E estimates that the earliest likely period for possible resolution of its challenge to EPA's Final Rule in the Tenth Circuit is two years, but the appeal could extend into 2014, increasing the pre-decision expenditures to well over $200 million.

OG&E and its customers will suffer irreparable harm because there is no mechanism for them to recover the Scrubber Project costs from EPA if the Final Rule is found to be invalid. This presents a situation analogous to where a party is subject to monetary damages that are not otherwise recoverable. Courts have held that "[i]mposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (citing *Chamber of Commerce v. Edmonson*, 594 F.3d 742, 770-71 (10th Cir. 2010)). In *Crowe & Dunlevy*, the Tenth Circuit upheld the district court's grant of a preliminary injunction relieving the law firm from having to return a portion of fees from an Indian tribunal client. The Court recognized the irreparable harm that would result because, though the main injury would be financial, it could not be remedied by legal means because the Indian tribunal client has sovereign immunity and could not later be compelled to repay the fees. *Id.* at 1157-58.

III. The Balance of Equities Favors Granting Petitioners' Stay Request, and Granting a Stay Is in the Public Interest

The balance of equities and the public interest strongly support granting Petitioners' stay request pending completion of judicial review of the Final Rule. The Tenth Circuit, of course, will ultimately determine the validity of the Final Rule. For these purposes, however, balancing the equities focuses on a comparison of (i) the effects of keeping the Final Rule's compliance deadline in place pending review and assuming that the Final Rule is eventually overturned, with (ii) the effects of suspending the effective date and compliance deadline in the Final Rule pending review and assuming that the Final Rule is eventually affirmed. In the context of regional haze, this should not be a close call.

If the FIP and its compliance deadline remain effective and the Final Rule is overturned, Petitioners have already demonstrated the substantial economic impact that would have on the State, OG&E, and/or its customers. OG&E will be required to expend significant resources immediately in order to implement the Scrubber Project with any chance of meeting the five year deadline, and just in the first two years, the costs will total approximately $200 million. Even if OG&E were able to absorb those costs into its rate structure, this will have an obvious adverse effect on the citizens of Oklahoma and Arkansas who have to pay those higher electricity rates. In today's economic climate, those very real economic impacts of EPA's FIP cannot and should not be ignored.

Aside from the economic consequences of EPA's decision, a stay of the effective date of the FIP would also reflect an appropriate respect for State sovereignty as embodied in the regional haze provisions of the CAA and the RHR. While EPA has indicated its disagreement with Oklahoma's BART determinations with respect to the OG&E Units, Congress's unquestioned intent to make the States the lead entity in designing regional haze programs counsels in favor of a stay where EPA has taken the extraordinary step of rejecting Oklahoma's

exercise of that Congressional authority and substituted its own conclusions in the place of the State's considered judgment. Moreover, a stay would in some small part give the affected parties and EPA the opportunity to disentangle the error created by EPA's consideration of the Oklahoma SIP from its promulgation of the Oklahoma FIP, particularly if EPA also grants Petitioners' request for reconsideration. *See* 42 U.S.C. § 7410(c) (requiring final action on a SIP as predicate for promulgation of a FIP).

On the other hand, granting Petitioners' stay request will have no negative consequences. Congress has established the goal for the regional haze program to be achieving "natural visibility conditions by the year 2064." *See* 40 C.F.R. § 51.308(d)(1)(i)(B). Even if the Final Rule is ultimately upheld, a 2-3 year delay in the effective date of the FIP portion of the Final Rule pending judicial review will not interfere with achieving the Congressional objective for visibility. Indeed, despite the fact that Congress first adopted the regional haze statutory provisions in 1990, EPA itself delayed taking action to formulate the RHR for almost ten years. *See* 64 Fed. Reg. 35,714 (July 1, 1999). The absence of a negative impact on visibility from a delay in the compliance deadline for the FIP is particularly apparent here where EPA acknowledges that Oklahoma and the OG&E Units in particular have no perceptible impact on visibility even today.

Importantly, the regional haze statutory provisions and the RHR do not address matters of public health. Instead, the regional haze program is designed for the prevention and remedying of impairment of visibility in national parks and other public lands. *See* 42 U.S.C. § 7491(a)(1). Thus, delaying the effective date of the FIP does not create any health risks to the public, much less risks that would justify compelling immediate capital projects that will be expensive and disruptive of the State economy and OG&E's electric generating operations. *See, e.g., Tate Access Floors, Inc. v. Interface Architectural Res., Inc.*, 279 F.3d 1357, 1364 (Fed. Cir. 2002)

(noting the absence of a public health threat as a significant factor favoring a preliminary injunction).

CONCLUSION

For the foregoing reasons, Petitioners' request for reconsideration and for an administrative stay of the compliance deadlines with respect to the Oklahoma FIP pending judicial review of the Final Rule should be granted.

Dated: February 24, 2012

Respectfully submitted,

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STATE ATTORNEYS GENERAL
A Communication from the Chief Legal Officers of the States of
Arizona, Florida, Guam, Indiana, Kansas, Kentucky, Ohio, Oklahoma and Utah.

August 4, 2011

Hon. Lisa P. Jackson
Administrator
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EPA Headquarters – Ariel Ross Building
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Mail Code: 1101A
Washington, D.C. 20460

Re: Proposed Utility MACT Rule:
EPA-HQ-OAR-2009-0234; EPA-HQ-OAR-2011-0044

Dear Ms. Jackson:

As State Attorneys General, we are writing because of our concern about the lawfulness of the procedures followed by the Environmental Protection Agency ("EPA") in developing its recently proposed regulation, "Maximum Achievable Control Technology Rule" for utilities ("Utility MACT Rule").

In our view, the EPA has not abided by the direction given to federal agencies – including the EPA – by President Barrack Obama with respect to the procedures that agencies must follow to assess the *cumulative* impact of their proposed regulations. *See* Executive Order No. 13,563, 76 Fed. Reg. 3, 821 (Jan. 18, 2011). Given this lack of compliance, we ask that your agency withdraw its proposed Utility MACT Rule, at least until such time as your agency conducts a cumulative impact analysis, as directed by the President.

President Obama issued Executive Order No. 13,563 in order to make it clear that federal agencies are to assess the cost of cumulative regulations when they propose to impose new requirements on society, including businesses. His Executive Order "is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12,866 of September 30, 1993."[1] Thus, in order to ascertain the full effect of Executive Order No. 13,563, it is necessary to turn to the previous Executive Order, cited by President Obama, on this subject.

Issued by President Bill Clinton, Executive Order 12,866 provides:

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[1] Executive Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

> Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, *the costs of cumulative regulations.*[2]

This focus on a cumulative analysis reflects the view that government regulations should be examined for their overall effect, and not simply looked at in isolation. As Executive Order No. 12,866 explains, "[i]n deciding whether and how to regulate, agencies should assess *all* costs and benefits of available regulatory alternatives."[3]

In evaluating the proposed Utility MACT Rule, a cumulative impact analysis is especially important because of the large number of related regulations the EPA has adopted, has proposed for adoption, and/or is currently considering proposing. Although EPA has not conducted its own cumulative analysis, the private sector has done so, focusing on the combined impact of the proposed Utility MACT Rule and the recently-adopted Transport Rule (a/k/a Cross-State Air Pollution Rule).

As you may know from the comments filed in opposition to the Utility MACT Rule, the American Coalition for Clean Coal Electricity ("ACCE"), commissioned the highly-regarded National Economic Research Associates ("NERA") to prepare a report. The initial NERA report shows that the combination of the Transport Rule and the Utility MACT Rule will be a serious blow to the economy, causing a net loss of 1.4 million jobs by 2020.[4] The combination of the two regulations will also cause a substantial increase in retail electricity prices, with the price increase estimated to top 23 percent in some areas of the country.

In our judgment, it would be arbitrary and capricious for your agency to adopt the proposed Utility MACT Rule without conducting a cumulative impact analysis. Even without Executive Orders No. 13,563 and 12,866, the dire results of the privately-commissioned NERA analysis would make it irresponsible for your agency to do so. Given President Obama's directive – as set forth in those Executive Orders – we believe that it is especially inappropriate for your agency to proceed on its current course.

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[2] Executive Order No. 12,866, 58 Fed. Reg. 51,735, 51,736 (Sept. 30, 1993) (emphasis added). It should also be noted that the requirement for a cumulative impact analysis dates back to President Ronald Reagan, who required federal agencies, when they propose new regulations to "tak[e] into account the condition of the particular industries affected by regulations . . . *and other regulatory actions contemplated for the future.*") (emphasis added). *See* Executive Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

[3] *Id.* (emphasis added).

[4] The report can be found at http://www.americaspower.org /NERA_CATR_MACT_29.pdf.

We ask that the proposed Utility MACT Rule be withdrawn until full compliance with those Executive Orders is achieved.

In making this request, we recognize that you have agreed to a consent decree that gives you a November 16, 2011 deadline for adopting a final rule governing coal- and oil-fired electric generating units.[5] We also recognize, however, that the deadline is not set in stone, and that you are able to ask the court to extend the deadline "for good cause shown." The need for your agency to conduct a cumulative analysis – as required by Executive Orders No. 13,563 and 12,866 – would certainly constitute good cause, and we would be pleased to support the need for an extended deadline if you ask the court to grant it.

Sincerely,

Thomas Horne
Attorney General of Arizona

Pam Bondi
Attorney General of Florida

Jack Conway
Attorney General of Kentucky

Leonardo M. Rapadas
Attorney General of Guam

Mike DeWine
Attorney General of Ohio

Gregory F. Zoeller
Attorney General of Indiana

E. Scott Pruitt
Attorney General of Oklahoma

Derek Schmidt
Attorney General of Kansas

Mark L. Shurtleff
Attorney General of Utah

---

5 *See American Nurses Assoc. v. Jackson*, No. 1:08-02198 (D.D.C.).

Re: Fw: Pending Assignments on the Overdue Report
Cynthia Gaines to: Sabrina Hamilton 09/08/2011 05:10 PM

History: This message has been replied to.

Sabrina,

I will be able to close all except for 3471.

Cynthia A. Gaines
Correspondence Specialist
Office of the Executive Secretariat
U.S. Environmental Protection Agency
202-564-1788

Sabrina Hamilton Please close AX-11-001-3539. It also pertains t... 09/08/2011 01:27:48 PM

From: Sabrina Hamilton/DC/USEPA/US
To: Cynthia Gaines/DC/USEPA/US@EPA
Date: 09/08/2011 01:27 PM
Subject: *Fw: Pending Assignments on the Overdue Report*

Please close **AX-11-001-3539**. It also pertains to MATS. Thanks,

Sabrina

Sabrina Hamilton
Air and Radiation Liaison Specialist
Office of Air and Radiation - Correspondence Unit
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue, N.W. (6101-A)
Washington, D.C. 20460
Tel: (202) 564-1083
Fax: (202) 501-0600

----- Forwarded by Sabrina Hamilton/DC/USEPA/US on 09/08/2011 12:25 PM -----

From: Sabrina Hamilton/DC/USEPA/US
To: Cynthia Gaines/DC/USEPA/US@EPA
Date: 09/02/2011 01:41 PM
Subject: *Fw: Pending Assignments on the Overdue Report*

Cynthia,

We are also requesting closure on **AX-11-001-3471** which is a MATS letter. Thanks,

Sabrina

Sabrina Hamilton
Air and Radiation Liaison Specialist
Office of Air and Radiation - Correspondence Unit
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue, N.W. (6101-A)
Washington, D.C. 20460
Tel: (202) 564-1083

Respond to this because it pertains to HAPs, not MATS.

Fax: (202) 501-0600

----- Forwarded by Sabrina Hamilton/DC/USEPA/US on 09/02/2011 01:40 PM -----

From: Sabrina Hamilton/DC/USEPA/US
To: Cynthia Gaines/DC/USEPA/US@EPA
Cc: zinger.don@epa.gov, Jenny Noonan/RTP/USEPA/US@EPA, walker.jean@epa.gov, Gloria Hammond/DC/USEPA/US@EPA, Maria Sanders/RTP/USEPA/US@EPA, Sherry Russell/RTP/USEPA/US@EPA
Date: 09/01/2011 05:28 PM
Subject: Re: Pending Assignments on the Overdue Report

Cynthia,

The majority of the controls on the list below are closed. Please close the ones that I have highlighted. When Eric gets back, please check with him to see if he will approve four additional controls that didn't appear on the list that pertains to MATS. They are: **AX-11-001-3752; 3952; 4165 and 4307**. Thanks for your assistance with this matter.

Sabrina

Sabrina Hamilton
Air and Radiation Liaison Specialist
Office of Air and Radiation - Correspondence Unit
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue, N.W. (6101-A)
Washington, D.C. 20460
Tel: (202) 564-1083
Fax: (202) 501-0600

Cynthia Gaines Sabrina, Listed below are the assignments that... 09/01/2011 02:37:43 PM

From: Cynthia Gaines/DC/USEPA/US
To: Sabrina Hamilton/DC/USEPA/US@EPA
Date: 09/01/2011 02:37 PM
Subject: Pending Assignments on the Overdue Report

Sabrina,

Listed below are the assignments that OEX has approved to be closed in CMS without a response:

2479	1505	2164
2742	3323	2357
3548	2697	2375
3373	2470	2363
1553	2688	2369
2062	2696	2366
2623	2694	2284
2701	2689	2371
1212	2577	2361
3340 - MATS	2578	2358
3239 - MATS	**3380 - MATS**	
2515	**3339 - MATS**	
3242 - MATS	**3321 - MATS**	

3249 - MATS 2374
1479 3361
1480 3550 - MATS

Please let me know what controls you would like to remain open in CMS. Thanks.

Cynthia A. Gaines
Correspondence Specialist
Office of the Executive Secretariat
U.S. Environmental Protection Agency
202-564-1788

Re: Controlled Correspondence
Don Zinger to: Eric Wachter 08/30/2011 12:53 PM
Cc: Cynthia Gaines

Eric,
Thanks for the reply. I appreciate you looking into this.

Don

Eric Wachter Don, I understand your concerns. I have reviewe... 08/29/2011 05:31:37 PM

From: Eric Wachter/DC/USEPA/US
To: Don Zinger/DC/USEPA/US@EPA
Cc: Cynthia Gaines/DC/USEPA/US@EPA
Date: 08/29/2011 05:31 PM
Subject: Re: Controlled Correspondence

Don,
I understand your concerns. I have reviewed the list and will be changing a number of them from direct reply to FYI. We will be making the changes to the assignments here in OEX. Let me know if you have any more questions or would like to discuss further.

Eric E. Wachter
Director, Office of the Executive Secretariat
U.S. Environmental Protection Agency
(202) 564-7960 office
(202) 596-0246 blackberry
(202) 501-1328 fax

Don Zinger Eric, I'd like to raise an issue that has been caus... 08/17/2011 10:57:33 AM

From: Don Zinger/DC/USEPA/US
To: Eric Wachter/DC/USEPA/US@EPA
Date: 08/17/2011 10:57 AM
Subject: Controlled Correspondence

Eric,
I'd like to raise an issue that has been causing OAR staff some recent frustration. It concerns having to send individual responses to commenters on our proposed rules. As you know, OAR authors numerous rules, many of which are high visibility and controversial. So, it follows that we receive an extremely high volume of comments during the public comment periods - thousands or tens of thousands are not unusual. According to our staff who handle correspondence, recently OEX has been assigning incoming comment letters, many of which are addressed to the docket office as they should be, to OAR for a reply. When our staff contact OEX staff and explain that these are straightforward comment letters on our proposed rules and therefore not appropriate for an individual reply, we are told that we must prepare a reply. Sometimes, after we do this for the first dozen or so letters on a proposal, OEX reverses course and future letters are assigned to us as "FYI." All of that seems a bit arbitrary to our staff but their primary concern is that the technical staff who need to review ALL comment letters and make revisions to a final rulemaking package, including a comprehensive Response to Comments document, often on tight court-ordered deadlines, are diverted to drafting (in our view unnecessary) individual response letters.

Obviously, we fully understand the need to respond individually to Members of Congress, Governors, and usually, other elected officials at the state and local levels who send their comments to the Administrator. But we are requesting that other straight comment letters on proposed rules - from private citizens, businesses, trade associations, public interest groups, etc., be assigned to OAR as FYI only. We will

make sure they are all entered into the docket and the comments they contain will be addressed in the formal Response to Comments document issued with each final rule.

I'm hoping we can arrive at a mutually satisfactory understanding with OEX on correspondence that is appropriate for an individual response letter. I'd be pleased to talk to you about this matter if that would help. Thanks for your consideration.

Don

Don Zinger
Chief of Staff
Office of Air & Radiation
US EPA
Phone: 202-564-1109

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

October 12, 2011

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

RE: EPA's estimate of methane emissions from upstream natural gas development

Dear Ms. Jackson.

It has come to my attention that the agency you oversee, the U.S. Environmental Protection Agency, may be very significantly overestimating methane emissions from natural gas production. If true, this could have serious implications for the natural gas exploration and production industry nationwide, particularly to the extent current and future regulatory proposals are based on or justified by reference to those estimates.

As a result, I write to inquire about the methods EPA employs to estimate methane emissions and about claims in support of new regulations based on EPA's estimates. My purpose is to ensure that the federal government is providing reliable information upon which policies that may affect the citizens of the State of Oklahoma may be based.

In 2010, EPA issued a background technical support document titled, "Greenhouse gas emissions reporting from the petroleum and natural gas industry." In the report, EPA altered the methodology it had previously used to estimate methane emissions from natural gas production. Before 2010, EPA estimated 0.02 metric tons of methane was emitted per well completion. In 2010, EPA made dramatic changes to its estimates. The new estimates hold that conventional natural gas wells emit 0.71 metric tons of methane, and shale gas wells emit 177 metric tons of methane per well completion. As a result of these new estimates, EPA adjusted prior-year US GHG emission reports retroactively as far back as 1990 to reflect the new estimates. These significant increases in the estimates raise questions about the methodology used to create the estimates.

313 N.E. 21ST STREET • OKLAHOMA CITY, OK 73105 • (405) 521-3921 • FAX: (405) 521-6246

Recently a report exploring the inaccuracies in EPA's methodology in determining methane emissions from natural gas production convinced me that those questions could be valid. IHS CERA, a highly respected research firm with specific expertise in the oil and natural gas production sector, released a report entitled, "Mismeasuring Methane: Estimating greenhouse gas emissions from upstream natural gas development." In its report, IHS CERA points out specific flaws EPA made in its analysis, including:

- The misuse and inaccurate application of Natural Gas STAR program data — collected from a small number of wells — to assume industry-wide emission rates.

- EPA's flawed rounding of data points to the nearest hundred, thousand, and even ten thousand Mcf to overcome the "high variability and uncertainty" in the industry.

- Developing an assumption that producers in Oklahoma vent to the atmosphere during flowback, rather than commonly flaring or capturing emissions, simply because Oklahoma does not mandate flaring or recovery. (Many of the nation's best operators drill in Oklahoma. To assume these producers do not flare or capture this marketable product is not only misguided, it would be flat wrong.)

Because of the flaws I have listed, and many others I have not, EPA may have led researchers and other governmental bodies to apply inaccurate statistics to the research and reports they develop. For example, Dr. Robert Howarth of Cornell University led a team that released a study this past spring questioning whether natural gas was truly a cleaner fuel than coal. Certainly Dr. Howarth's study included several inaccurate assumptions of his own making, but the basis for his review lies in the overestimation of methane emissions developed by EPA.

The Cornell study and EPA's methane emission estimates are finding voice in other government studies. The U.S. Department of Energy SEAB Natural Gas Subcommittee report even mentions the "pessimistic conclusion about the greenhouse gas footprint of shale gas production and use." Such a statement, if founded on inaccurate data, can cast unjustified aspersions upon an entire industry.

Then EPA itself, in announcing new proposals to regulate emissions from exploration and production facilities, incorrectly used the significantly overstated emission estimates to show that there would not be economic harm to domestic producers. In fact, and even more astoundingly, EPA uses these incorrect assumptions to claim that the rule will quickly result in a net savings of nearly $30 million annually to domestic producers.

To assure estimates are properly developed and to provide the citizens of the State of Oklahoma with the proper tools to determine the accuracy of EPA data reports, studies, and the justification for any current or future EPA regulatory proposals, I ask that you provide my office with the following information:

- Any and all information pertaining to the determination of natural gas methane emission estimates.

- Any and all information related to why it is appropriate to round emission rates to the nearest hundred, thousand, or ten thousand Mcf per well completion and how this does not produce an inaccurate end estimate.

- Any and all information explaining why EPA would improperly assume Natural Gas STAR data — which records ALL natural gas collected through green completions, including natural gas collection at the conclusion of the flowback process — is an appropriate basis for determining methane emission from all wells.

- Any and all information explaining what led EPA to conclude — incorrectly — that Oklahoma natural gas producers do not commonly flare or capture methane emissions to reduce venting simply because Oklahoma regulators do not mandate flaring.

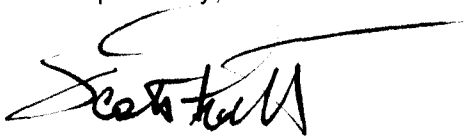
- Any and all information explaining why, if EPA estimates are accurate, a natural gas producer would allow significant volumes of its product to simply vent to the atmosphere when it could be captured and marketed.

- Any and all existing, proposed and potential rules or regulations which are or will be based on EPA estimates of methane emission from natural gas wells. In addition, please provide any information that could be used to justify those rules, regulations determine enforcement priorities or to review enforcement effectiveness by the federal government or states.

- Any and all consideration that has been given to reverting to the previous methane estimation methodology while industry data is collected (MRR subpart W) to provide a more accurate estimate of emissions.

Your assistance in responding to these questions will provide my office with the ability to assure all Oklahomans that they can begin to place trust in the information upon which regulatory decisions are made.

Respectfully,



E. Scott Pruitt
Attorney General

cc: Ms. Gina McCarthy
Assistant Administrator
Office of Air and Radiation
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Ms. Janet McCabe
Deputy Assistant Administrator
Office of Air and Radiation
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

Ms. Nancy Sultey
Chairwoman
Council on Environmental Quality
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

E. Scott Pruitt
Attorney General of Oklahoma
313 N.E. 21st
Oklahoma City OK 73105

The Honorable Lisa Jackson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington, DC 20460

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 21 2012

OFFICE OF
AIR AND RADIATION

Mr. E. Scott Pruitt
Attorney General of Oklahoma
313 N.E. 21st
Oklahoma City, Oklahoma 73105

Dear Mr. Pruitt:

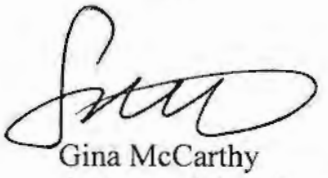
Thank you for your letter of October 12, 2011, regarding the U.S. Environmental Protection Agency's estimate of methane emissions from unconventional natural gas development requiring hydraulic fracture. We welcome the opportunity to discuss the emissions data and our approach to developing these estimates.

The EPA updates the U.S. Inventory of Greenhouse Gas Emissions annually based on the best available data and information. The update made in 2011 to the emissions estimates for the natural gas production sector was particularly important because previous estimates were based on a joint 1996 EPA/Gas Research Institute study, when hydraulically fractured gas wells were not common. The revised estimate is based on more current data from multiple companies representing over a thousand production wells across the United States. The EPA is confident this estimate more accurately reflects current industry production practices by including, for the first time, a robust estimate of emissions from hydraulically fractured gas well completions.

While the EPA is confident that our current estimates are based on the best information available when they were released, we will continue to refine and improve upon them as new data and information become available. Most recently, the EPA received additional data and information as part of the formal public notice and comment process for the proposed New Source Performance Standards for volatile organic compounds. The EPA plans to fully evaluate all data and information received through this process. In addition, oil and gas facilities subject to Subpart W of the Greenhouse Gas Reporting Program began data collection efforts at the beginning of 2011 and will begin reporting their emissions data to the EPA in September 2012. We expect that this information will be invaluable and will improve our understanding of the location and magnitude of oil and gas emissions sources.

I have enclosed information that I believe addresses the issues and questions raised in your letter. I hope this information is useful. Thank you again for your interest in EPA's emissions estimates and if you have further questions, please contact me or have your staff contact Bill Irving in EPA's Office of Air and Radiation, Climate Change Division at (202) 343-9065.

Sincerely,



Gina McCarthy
Assistant Administrator

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 21 2012

OFFICE OF
AIR AND RADIATION

Mr. E. Scott Pruitt
Attorney General of Oklahoma
313 N.E. 21st
Oklahoma City, Oklahoma 73105

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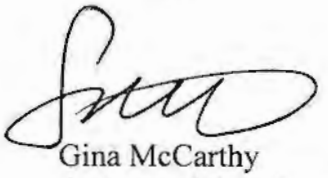

Gina McCarthy
Assistant Administrator

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 21 2012

OFFICE OF
AIR AND RADIATION

Mr. E. Scott Pruitt
Attorney General of Oklahoma
313 N.E. 21st
Oklahoma City, Oklahoma 73105

Dear Mr. Pruitt:

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I have enclosed information that I believe addresses the issues and questions raised in your letter. I hope this information is useful. Thank you again for your interest in EPA's emissions estimates and if you have further questions, please contact me or have your staff contact Bill Irving in EPA's Office of Air and Radiation, Climate Change Division at (202) 343-9065.

Sincerely,

Gina McCarthy
Assistant Administrator

Enclosure

Enclosure: Information on Questions and Issues Raised

Further information on the development of the revised methane emission estimates for hydraulically fractured gas wells

Hydraulically fractured gas well completions and workovers are the majority of completions and workovers today, but were not common during the development of the 1996 EPA/GRI Study. The GRI study estimated an emission factor for gas well completions by making several key assumptions. These assumptions were based on the data and knowledge of industry practices available at the time that are no longer applicable today. These assumptions included:

- Emissions that occur during the well completion are equal to one day of the average gas production rate per gas well in 1992 based on the American Gas Association's *Gas Facts*.

- All completion emissions are flared (reducing the methane emissions from each completion by approximately 98 percent).

Since the publication of the GRI study, the number of hydraulically fractured gas well completions has nearly doubled, from approximately 4,600 to 9,000 hydraulically fractured wells. Through our extensive interactions with oil and gas companies and industry experts and through a review of best available data, EPA became aware that the assumptions made in the 1996 EPA/GRI study did not accurately characterize methane emissions from hydraulically fractured gas wells. In particular:

- The 16.97 million cubic feet per year average gas production rate in 1992, which GRI used as a surrogate for the average completion flow rate, includes a large number of marginal wells. Marginal low pressure wells have significantly less gas production than newly completed hydraulically fractured wells. In 2010 the average gas production from hydraulically fractured gas wells was 65.7 million cubic feet per year.

- Significant quantities of gas are produced during the completion process for a hydraulically fractured gas well, in particular during the flowback period. In 2004, companies began sharing information with EPA on voluntary activities to reduce emissions from hydraulically fractured gas well completions, referred to as Reduced Emission Completions. Companies reported that the extended flowback time (as compared to conventional completions) and increased volume of natural gas during the flowback period, made it cost-effective to bring portable equipment on-site to capture the increased natural gas for market. EPA currently assumes an average flowback period of 3 to 10 days for hydraulically fractured wells.

- Finally, through interactions with companies at EPA and industry events as well as public data and experiences shared by the industry, we are aware that not all companies are flaring the gas. In fact, many companies are either capturing through RECs or venting the gas that occurs during the completion of hydraulically fractured gas wells.

On the basis of the new information reported by companies carrying out hydraulic fracturing and RECs, EPA developed an emission factor specifically for hydraulically fractured gas well completions. This factor was used in the Technical Support Document for Subpart W of Part 98, GHG reporting rule, and

also in the 1990-2009 Inventory (published in April 2011). A complete list of improvements to the 2011 inventory are described in detail in the Technical Note published with inventory, available at - (http://www.epa.gov/methane/downloads/TechNote_Natural%20gas_4-15-11.pdf)

The EPA emission factor was based on four independent studies that together contained over a thousand data points. Three of the studies provided a direct industry estimate of the emissions reduced by companies through a completion gas capture technology, Reduced Emission Completions (RECs) or Green Completions, from over a thousand wells across the United States. The fourth source calculated a nation-wide estimate of gas well completion venting based on an industry estimate. EPA used this estimate to develop an emission factor based on activity data from the American Petroleum Institute's *Basic Petroleum Handbook.*

EPA used information from four data sets representing a large number of wells to generate the new emission factor. The data from these wells collectively indicate that the true average emission rate for a hydraulically fractured well completion is substantially higher (greater than two orders of magnitude) than the 1996 GRI/EPA emission factor that is applicable to conventional well completions. These data also indicate that there is a high degree of variability in emission rates across hydraulically fractured well completions due to geology, technology and operating conditions. The rounding to a single significant digit for the average emission rates calculated for each of the four data sets reflects this variability. As the variability was already reflected through the rounding of the rate developed from each data set, EPA elected not to round the final average calculated from the four rates. Had EPA rounded the final number, it would be 9,000 Mcf per completion or 2% lower. If EPA had not rounded the results of the initial studies, the final average well emission factor would be 11,057 Mcf/completion, or 21% higher. EPA will consider the different approaches to rounding consistency in future updates of the national inventory.

EPA's revised emission estimates have undergone extensive public review, and EPA has encouraged companies and other stakeholders to provide data to help refine the GHG emissions estimates. The first review took place as part of the public notice and comment process for the proposal of subpart W of Part 98, GHG Reporting rule, where the emission factor for hydraulically fractured well completions was originally published. The second review was conducted during the public review process for the 1990-2009 U.S. Inventory of Greenhouse Gas Emissions Report (early 2011). In addition, EPA held a stakeholder webcast in July 2011, including oil and gas companies, trade associations, and other organizations to discuss potential areas for improvement of the natural gas category of the GHG Inventory, including the emissions estimates for well completions.

EPA recently received additional data from URS Corporation as part of the national inventory preparation process and also as part of the formal public notice and comment process of the proposed oil and gas new source performance standards (NSPS) for VOCs. EPA plans to carefully evaluate this and all other additional relevant information provided to us during the NSPS public comment period. This information will first be evaluated against the data and assumptions used in the impacts analysis to the proposed rule to determine if any updates should be made to the final rule analysis as a result of this information. Subsequently, all relevant updates will then be incorporated, as applicable, in the next cycle of the U.S. GHG Inventory.

More detailed information on the development of these estimates can be found in the following documents:

- The Technical Support Document to Subpart W of Part 98, Greenhouse Gas Reporting Rule (http://www.epa.gov/climatechange/emissions/downloads10/Subpart-W_TSD.pdf).

- The Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2009 (April 2011), starting on page 3-43 (http://www.epa.gov/climatechange/emissions/downloads11/US-GHG-Inventory-2011-Chapter-3-Energy.pdfl)

- Annex 3: Methodological Descriptions for Additional Source or Sink Categories, starting on page A-147 (http://www.epa.gov/climatechange/emissions/downloads11/US-GHG-Inventory-2011-Annex-3.pdf)

- The Technical Note published with the 2011 inventory that provides further details on the complete list of improvements made (http://www.epa.gov/methane/downloads/TechNote_Natural%20gas_4-15-11.pdf)

How EPA accounts for emission reductions from voluntary activities and State Regulations

Consistent with the overall approach used in the GHG inventory, EPA develops an emissions factor that represents unmitigated emissions per unit (e.g., equipment or operation). This factor is then used to calculate a national emissions total based on activity data (e.g., equipment counts). It is very important to note that EPA then adjusts this total by the amount of methane that is actually not emitted (i.e., that is instead flared or controlled with certain technologies and practices due to voluntary action and State regulations) in order to develop a national emissions total for a given source category and sector. Specifically, the development of the 2009 emissions estimates (published in April 2011) for unconventional natural gas wells requiring hydraulic fracture involved three key steps:

- Develop an unmitigated national emission factor for an uncontrolled hydraulically fractured gas well (that is not capturing or flaring the gas) based on best available data from independent sources representing over one thousand wells across the United States.

- Adjust this factor by the average methane content of gas (on a regional basis), multiply by the number of wells in each region, and then sum the regional totals to calculate total unmitigated methane emissions from the over 8,000 completions and workovers with hydraulic fracturing in the U.S. in 2009.

- Calculate the amount of the methane that is not emitted, using data on voluntary action and State regulations in order to develop a more accurate picture of actual emissions from this source category and sector.

Based on this approach, the 1990-2009 U.S. Inventory of Greenhouse Gas Emissions and Sinks (published in April 2011) estimated that approximately 9.4 billion cubic feet of methane was emitted from hydraulically fractured wells in 2009. EPA believes this is a substantial improvement over previous estimates and more accurately reflects current industry practices. Table 1 shows the detailed calculations performed by EPA to derive this estimate.

The calculation of reductions (bullet point #3 above) applicable to gas well completions and workovers with hydraulic fracturing has two elements: voluntary reductions and reductions due to state regulations.

- Voluntary reductions include both reduced emission completion and flaring reductions reported by the industry. All voluntary reductions that have been reported to EPA by the industry are captured in the inventory. EPA estimates that 36% of total potential methane emissions from completions are reduced through voluntary actions taken by industry.

- EPA developed a national-level estimate of flaring based on its knowledge of state regulations requiring flaring at the time. When EPA developed the emission factor, many states did not have regulations mandating flaring. State regulations and information on those regulations have expanded since EPA developed its estimate. EPA will continue to evaluate this approach to determine if a more detailed state-level estimate can be developed in the future. EPA estimates that 51% of total potential methane emissions from completions are reduced through regulation.

The end result is that EPA estimates that only 13% of total potential methane emissions are vented to the atmosphere.

Potential reasons companies may emit natural gas rather than capture or flare it

In the many interactions between EPA staff and oil and gas company personnel, challenges companies have noted in implementing methane emission reduction activities include but are not limited to: 1) competition for resources - both human and economic - to undertake the emission reduction projects (For example, companies may simply generate a higher rate of return from drilling a new well rather than investing in equipment to reduce or eliminate methane emissions at an existing wellhead.), 2) historical industry practice that does not prioritize natural gas conservation over oil production, 3) methane emissions are not regulated and therefore companies may simply vent the gas rather than flare it in order to save time and capital, and 4) lack of awareness of specific emissions sources and volumes. (For example, natural gas powered high-bleed pneumatic devices, which are *designed* to vent natural gas to the atmosphere, are in wide use throughout the industry even though low or zero emissions pneumatic devices exist. Companies know that this natural gas is vented, but if the devices are operational, there may not be incentive to allocate human resources and capital to replace them even though low or no bleed devices quickly pay off in gas savings.)

Further Information on EPA's recently proposed oil and gas air emissions standards

The U.S. GHG Inventory estimates for hydraulic fractured gas wells and other data informed the analysis supporting the proposed New Source Performance Standards, which would reduce harmful air pollution (VOCs and Hazardous Air Pollutants) from the oil and natural gas industry while allowing continued, responsible growth in U.S. oil and natural gas production. More information on this proposed rule, including the Regulatory Impact Analysis is available at http://www.epa.gov/airquality/oilandgas. Additionally, these data were used to inform development of Subpart W of the GHG Reporting Rule.

Table 1
Data for Unconventional Completions and Workovers in 2009.
For 1990-2009 GHG inventory

Activity Factors		
Well Count	(Wells)	50,434
Well Completions	(Completions/year)	4,169
Well Workovers	(workovers/year)	5,043
Emission Factors and Adjustments		
Well Completions	(scf/completion)	9,175,000
Well Workovers	(scf/workover)	9,175,000
Regional methane content	(percent)	Ranges from 78.4% to 91.9%
*Emissions**		
Well Completions	(MMscf)	30,962.21
Well Workovers	(MMscf)	37,184.52
TOTAL UNCONTROLLED	**(MMscf)**	**68,146.73**
Voluntary Reductions	**(MMscf)**	24,235
Regulation Reductions		
Well Completions	(MMscf)	15,659
Well Workovers	(MMscf)	18,805
Regulation Subtotal	(MMscf)	34,464
NET EMISSIONS	**(MMscf)**	**9,448**

* The emissions are calculated on a regional basis by multiplying the number of well completions and workovers in each region by the appropriate emission factor above, and adjusting for methane content of the natural gas in that region. These regional methane emissions estimates are then summed to a national number, presented in the table as "Total Uncontrolled."

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Office of Air
and Radiation

Mr. E. Scott Pruitt
Attorney General of Oklahoma
313 N.E. 21st
Oklahoma City, Oklahoma 73105

Dear Mr. Pruitt:

Thank you for your letter of October 12, 2011 regarding the U.S. Environmental Protection Agency's estimate of methane emissions from unconventional natural gas development requiring hydraulic fracture. We welcome the opportunity to discuss the emissions data and our approach to developing these estimates.

The EPA updates the U.S. Inventory of Greenhouse Gas Emissions annually based on the best available data and information. The update made in 2011 to the emissions estimates for the natural gas production sector was particularly important because previous estimates were based on a joint 1996 EPA/Gas Research Institute study, when hydraulically fractured gas wells were not common. The revised estimate is based on more current data from multiple companies representing over a thousand production wells across the United States. The EPA is confident this estimate more accurately reflects current industry production practices by including, for the first time, a robust estimate of emissions from hydraulically fractured gas well completions.

While the EPA is confident that our current estimates are based on the best information available when they were released, we will continue to refine and improve upon them as new data and information become available. Most recently, the EPA received additional data and information as part of the formal public notice and comment process for the proposed New Source Performance Standards for volatile organic compounds. The EPA plans to fully evaluate all data

OAR/OAP/CCD/MWeitz/343-9897/01/26/12/AX-11-001-7690/Pruitt

concurrence						
Mail Code	6207-J	6207-J	6207-J	6207-J	6201-J	6101-A
Name	MWeitz	BIrving	PGunning	RBirnbaum	SDunham	GMcCarthy
Date	1/31/12	1/31/12	1/31/12	1/31/12	2/1	
Initials	MW	WJI		RB	GD	

the beginning of this year and will begin reporting their emissions data to the EPA in September 2012. We

and information received through this process. In addition, oil and gas facilities subject to Subpart W of the Greenhouse Gas Reporting Program began data collection efforts at the beginning of this year and will begin reporting their emissions data to the EPA in September 2012. We expect that this information will be invaluable and will improve our understanding of the location and magnitude of oil and gas emissions sources.

I have attached information that I believe addresses the issues and questions raised in your letter. Again, thank you for your letter and interest in the EPA's emissions estimates. I hope the information provided is useful. If you have further questions, please contact me or have your staff contact Bill Irving in EPA's Office of Air and Radiation, Climate Change Division at (202) 343-9065.

Sincerely,

Gina McCarthy
Assistant Administrator

Enclosure

Message Information

Date 01/12/2012 06:07 PM
From Kristin Parker <kristinparker@JonesDay.com>
To LisaP Jackson/DC/USEPA/US@EPA
cc Gabrielle Stevens/DC/USEPA/US@EPA
Subject Oklahoma - Request for Administrative Stay of Supplemental Transport Rule

Message Body

Dear. Administrator Jackson:

Attached please find a Request for an Administrative Stay of EPA's Final Rule: "Federal Implementation Plans for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin and Determination for Kansas Regarding Interstate Transport of Ozone" (EPA-HQ-OAR-2009-0491). A copy of this request will also be sent to you via Federal Express.

Sincerely,

JONES DAY. | **Kristin Parker**

77 W. Wacker Drive, Chicago, IL 60601-1692 • **Direct**: 312.269.4342• **Fax**: 312.782.8585 • kristinparker@jonesday.com

Request for Administrative Stay.pdf

OEX Processing Information
Processed Date:
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Message Count

January 12, 2012

VIA E-MAIL & OVERNIGHT DELIVERY

The Honorable Lisa P. Jackson
Administrator, U.S. Environmental Protection Agency
Room 3000, Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
(jackson.lisa@epa.gov)

Re: Request for Administrative Stay of EPA's Final Rule: "Federal Implementation Plans for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin and Determination for Kansas Regarding Interstate Transport of Ozone" (EPA-HQ-OAR-2009-0491)

Dear Administrator Jackson:

As you are aware, on December 30, 2011 the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit Court") issued an order staying the U.S. Environmental Protection Agency's ("EPA's") recently promulgated Cross State Air Pollution Rule (the "CSAPR"). 76 Fed. Reg. 48,208 (Aug. 8, 2011); *EME Homer City Generation, L.P. v. EPA*, No. 11-1302 (D.C. Cir. Dec. 30, 2011) (order granting stay). The D.C. Circuit Court stayed the CSAPR in its entirety while it reviews the merits of various legal challenges to the rule. *Id.* Until the stay is lifted, the Clean Air Interstate Rule ("CAIR") remains in place and the CSAPR has no legal effect. *Id.; see also Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977); *Nken v. Holder*, 556 U.S. 418, ----, 129 S. Ct. 1749, 1758 (2009). Consistent with the D.C. Circuit Court's ruling, EPA stated yesterday that it would "not be taking action to implement the [CSAPR]," including allocating allowances, while the stay is in effect. *E-mail from Robert Miller, EPA, to Designated Representatives and Agents, Updates to CAMD Business System Due to CSAPR Stay* (Jan. 11, 2012).

Due to the stay of the CSAPR, the State of Oklahoma and the undersigned owners and operators of electric generating units in Oklahoma (collectively the "Oklahoma Utility Group") respectfully request that EPA grant an immediate administrative stay of the effective date of the supplemental CSAPR rule entitled "Federal Implementation Plans for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin and Determination for Kansas Regarding Interstate Transport of Ozone" (the "Supplemental CSAPR") and the compliance dates set forth therein.[1] EPA

[1] The Oklahoma Utility Group is a voluntary ad hoc coalition of electric generating companies doing business in Oklahoma and established for the purpose of evaluating and commenting on issues common to the group.

published the Supplemental CSAPR, which applies to Iowa, Michigan, Missouri, Oklahoma, Wisconsin and Kansas, in the Federal Register on December 27, 2011. 76 Fed. Reg. 80,759 (Dec. 27, 2011). As it now stands, the Supplemental CSAPR becomes effective on January 26, 2012. *Id.* at 80,761, 773. EPA has the authority to grant the requested relief pursuant to 5 U.S.C. § 705 *et. seq.*

The requested stay is necessary because the Supplemental CSAPR is dependent upon the underlying CSAPR and cannot stand on its own. The CSAPR, which was finalized on July 6, 2011, sets forth requirements to address the interstate transport of fine particulate matter and ozone precursors in twenty seven states, not including Oklahoma. On December 16, 2011, EPA finalized the Supplemental CSAPR, which "*implement[s]*" the CSAPR program to limit emissions of nitrogen oxide ("NO_x") during the ozone season as the federal implementation plan ("FIP") for Oklahoma. 76 Fed. Reg. at 80,761 (emphasis added). This program will require significant ozone season NO_x reductions from Oklahoma sources beginning in 2012. EPA seeks to effectuate these reductions by amending the stayed CSAPR regulations to include, *inter alia*, Oklahoma. 76 Fed. Reg. at 80,775-77. EPA, however, cannot amend a rule that has no legal effect.

In addition, EPA applies the CSAPR's ozone season NO_x program to Oklahoma in the Supplemental CSAPR based on a finding under Clean Air Act § 110(a)(2)(D)(i)(I) that Oklahoma significantly contributes to nonattainment or interferes with maintenance of the 1997 National Ambient Air Quality Standards ("NAAQS") for eight-hour ozone in Allegan County, Michigan. EPA's "significant contribution" finding hinges upon a single air quality receptor that was identified during the air quality modeling contained in the stayed CSAPR. 76 Fed. Reg. at 80,761-62. As EPA states in the Supplemental Rule:

> Five states (Iowa, Kansas, Michigan, Oklahoma, and Wisconsin), which EPA identified as interfering with maintenance problems at the Allegan County and/or Harford County receptors, based on modeling for the [CSAPR], uniquely contribute to these receptors, *i.e.*, absent these receptors the states would not be covered by the [CSAPR] ozone-season program . . .

Id. Because it was developed and utilized in connection with the CSAPR, EPA even refused to accept comments on various aspects of its air quality modeling (including with respect to the methodology used to identify receptors, the use of the CAMx air quality model, and use of emissions inventory data) in connection with the Supplemental CSAPR. *Id.* at 80,764.

EPA similarly relies exclusively on the methodologies set forth in the CSAPR to establish the NO_x emission budgets, variability limits and assurance levels for Oklahoma in the Supplemental CSAPR. 76 Fed. Reg. at 80,775-77. For example, EPA states in the Supplemental

(continued...)

The companies that comprise the Oklahoma Utility Group own and operate electrical generating units that are subject to the Supplemental CSAPR.

CSAPR that the Agency "is finalizing for the five states the ozone season new unit set-asides for allowance allocations to new units, determined in the same manner as for the other states covered in the [CSAPR] ozone season NO_x program." *Id.* at 80,769. EPA likewise finalizes "the unit-level allocations of [the CSAPR] NO_x ozone season allowances under the FIP to existing covered units in Iowa, Michigan, Missouri, Oklahoma, and Wisconsin" based on the "methodology and procedures used for allocations to existing units covered by the [CSAPR] ozone season NO_x program [as] specified in . . . the preamble to the final [CSAPR]." *Id.* at 80,770.

The validity of EPA's air quality modeling and the methodologies used in the CSAPR to establish emission budgets, variability limits and assurance levels, however, are the subject of several of the petitions for stay that were granted by the D.C. Circuit Court in the pending CSAPR litigation. *See, e.g., EME Homer City Generation, L.P. v. EPA*, (order granting stay); *Petitioner's Motion for Stay, Ohio v. EPA*, No. 11-1392 (D.C. Cir. Nov. 15, 2011); *Petitioner's Motion for Partial Stay, Entergy Corp. v. EPA*, No. 11-1360 (D.C. Cir. Oct. 26, 2011); *Petitioner's Motion for Partial Stay, Dairyland Power Coop.* v. EPA, No. 11-1394 (D.C. Cir. Oct. 24, 2011); *Petitioner's Motion for Stay, Wisconsin v. EPA*, No. 11-1393 (D.C. Cir. Oct. 24, 2011); *Petitioner's Motion for Stay, Envtl. Comm. of the Fla. Elec. Power Coordinating Grp., Inc. v. EPA*, No. 11-1373 (D.C. Cir. Oct. 14, 2011); *Petitioner's Motion for Stay, Louisiana v. EPA*, No. 11-1364 (D.C. Cir. Oct. 11, 2011); *Petitioner's Motion for Partial Stay, Southwestern Pub. Service Co. v. EPA*, No. 11-1375 (D.C. Cir. Oct. 7, 2011); *Petitioner's Motion for Stay, Kansas v. EPA*, No. 11-1329 (D.C. Cir. Oct. 5, 2011). As such, EPA cannot rely on them as the basis for the Supplemental CSAPR.

Even if the Supplemental CSAPR could legally be implemented without significant revisions (which both the State of Oklahoma and the Oklahoma Utility Group deny), the people of the State of Oklahoma would suffer substantial and irreparable harm if EPA were to do so. Oklahoma utilities (and ultimately ratepayers) would be forced to begin incurring significant costs to achieve timely compliance with the Supplemental CSAPR while the underlying CSAPR remains in limbo.[2] The CSAPR and the Supplemental CSAPR are so intertwined that any decision of the D.C. Circuit Court in the pending CSAPR litigation will undoubtedly have significant implications on the Supplemental CSAPR.

Furthermore, it would be unreasonable for EPA to implement CSAPR with respect to the five states covered by the Supplemental CSAPR and to implement CAIR with respect to the majority of affected states. Not only would this create two conflicting (and ineffective) trading programs, but it would also lead to untenable situations where a single state would be required to comply with both CAIR and CSAPR. Granting the requested stay of the Supplemental CSAPR, on the other hand, would avoid these pitfalls and allow EPA to take coordinated action in response to any decision issued by the D.C. Circuit Court in the pending CSAPR litigation.

[2] As noted in comments to the proposal for the Supplemental CSAPR filed by certain members of the Oklahoma Utility Group, the Supplemental CSAPR already does not provide sufficient time Oklahoma utilities to achieve the required emission reductions.

For all of the foregoing reasons, the above request for an immediate administrative stay of the Supplemental CSAPR and its compliance deadlines should be granted.

Sincerely,

The State of Oklahoma
By: /s/ E. Scott Pruitt
E. Scott Pruitt
Attorney General, State of Oklahoma

AES Shady Point, LLC
By: _____
Keith Brown
Vice President of AES Shady Point

Grand River Dam Authority
By: /s/ Charles J. Barney
Charles J. Barney, P.E.
Assistant General Manager, Thermal & Hydro Generation

Oklahoma Gas and Electric Company
By: _____
Patricia D. Horn
Vice President, Governance, Environmental Health & Safety

Oklahoma Municipal Power Authority
By: /s/ Cindy Holman
Cindy Holman
General Manager

Western Farmers Electric Cooperative
By: /s/ Brian Hobbs
Brian Hobbs
Vice President of Legal and Corporate Services

cc: Ms. Gabrielle Stevens
Clean Air Markets Division, Office of Atmospheric Programs
Mail Code 6204J
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
(stevens.gabrielle@epa.gov)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA, and OKLAHOMA INDUSTRIAL ENERGY CONSUMERS, an unincorporated association,	)	
Petitioners,	)	
v.	)	**No. 12-9526**
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and LISA P. JACKSON, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondents.	)	

PETITIONERS' MOTION TO CONSOLIDATE RELATED PETITIONS FOR REVIEW

Pursuant to Fed. R. App. P. 3(b)(2), Petitioners State of Oklahoma ("Oklahoma") and Oklahoma Industrial Energy Consumers, an unincorporated association ("OIEC") (together, "Petitioners"), respectfully move the Court to consolidate with their Petition for Review the closely related case of and *Oklahoma Gas and Electric Company v. EPA*, No. 12-9527 ("OG&E"), currently pending before the Court. Petitioners in each case have filed Petitions for Review ("Petitions") challenging the United States Environmental Protection Agency's final rule published on December 28, 2011, titled "Approval and Promulgation of Implementation Plans; Oklahoma; Federal Implementation Plan for Interstate Transport of Pollution

Affecting Visibility and Best Available Retrofit Technology Determinations." 76 Fed. Reg. 81,728 (Dec. 28, 2011) ("Final Rule"). Because both Petitions challenge the same Final Rule, the legal and factual issues in each Petition substantially overlap, and the resolution of both matters will likely rest on many of the same issues, consolidation better achieves judicial economy and conserves resources.

Pursuant to Local Rule 27.3(C), Petitioners state that Respondents' position on this motion is not known because Respondents have not yet entered an appearance in this proceeding.

BACKGROUND

In Section 169A of the 1977 Amendments to the Clean Air Act ("CAA" or "Act"), Congress enacted a program for protecting the aesthetics of the nation's national parks and wilderness areas. Congress added Section 169B to the Act (42 U.S.C. § 7491) in 1990 to address Regional Haze issues, and the U.S. Environmental Protection Agency ("EPA") promulgated regulations addressing Regional Haze in 1999, which are codified at 40 C.F.R. part 51, subpart P ("Regional Haze Regulations"). In passing the regional haze statutory provisions, Congress made clear its intent to delegate significant power to States to develop, review, approve, and implement site-specific implementation plans designed to make reasonable progress in achieving regional haze goals while balancing each State's unique economic and

power needs. *See, e.g.*, 123 Cong. Rec. 13,696, 13,709 (1977). The CAA and the Regional Haze Regulations require, in part, that a State balance five factors and make a determination as to the Best Available Retrofit Technology ("BART") appropriate for each qualifying facility regulated by the State (the "BART determination") and submit those determinations, along with other required elements, as state implementation plan ("SIP") revisions to EPA ("Regional Haze SIPs"). EPA has recognized that, because the issues to be balanced are uniquely State and source specific, "the State must determine the appropriate level of BART control for each source subject to BART." 70 Fed. Reg. 39,107 (July 6, 2005).

On February 17, 2010, Oklahoma submitted to EPA its regional haze revisions to the Oklahoma State Implementation Plan ("Oklahoma SIP"). *See* Oklahoma SIP, Doc. ID No. EPA-R06-OAR-2010-0190-0002. After properly balancing the BART factors, Oklahoma determined that low sulfur coal constituted BART for certain affected electrical generating units ("EGUs") within its jurisdiction.[1]

On March 22, 2011, EPA published a proposed rule proposing to approve in part and disapprove in part the Oklahoma SIP. *See* 76 Fed. Reg. 16,168 (Mar. 22, 2011). In the same notice, EPA proposed a federal implementation plan for Regional

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[1] The affected units are Oklahoma Gas And Electric Company's Units 1 and 2 at its Sooner EGU and Units 3 and 4 at its Muskogee EGU (collectively, the "OG&E Units") and Units 3 and 4 at American Electric Power/Public Service Company of Oklahoma's Northeastern EGU ("Northeastern Units").

Haze ("Regional Haze FIP") to substitute for those portions of the Oklahoma SIP that EPA proposed to disapprove.

On May 23, 2011, Oklahoma and OIEC joined a number of others in submitting comments to EPA opposing its proposed action and arguing that, for several reasons, EPA's proposed action was contrary to the CAA and Regional Haze Rules and was otherwise arbitrary and capricious. *See* Comment from Okla. Attorney General, Doc. ID No. EPA-R06-OAR-2010-0190-0040, dated May 23, 2011; Comment from OIEC, Doc. ID. No. EPA-R06-2010-0190-0051, dated May 23, 2011. Oklahoma and OIEC noted that the proposed rule, *inter alia*, would illegally usurp the authority of Oklahoma to determine BART for affected sources within its jurisdiction. Petitioners also highlighted EPA's failure to follow the CAA and conclude its action on the proposed Oklahoma SIP prior to seeking to step into the State's shoes by promulgating a Regional Haze FIP, EPA's failure to act within the time constraints dictated in the Act, and EPA's failure to properly consider the costs of compliance with the Regional Haze FIP.

Despite these comments and others, EPA published the Final Rule on December 28, 2011. EPA, in the Final Rule, disapproved Oklahoma's SO_2 BART determinations for the OG&E Units and the Northeastern Units and simultaneously finalized its Regional Haze FIP that imposed an SO_2 emission limit of 0.06lbs/MMBtu

for the OG&E Units and the Northeastern Units, which would require the installation of a scrubber at each affected unit. *See* 76 Fed. Reg. 81,729 (Dec. 28, 2011).

Petitioners filed petitions for review on February 24, 2012, challenging EPA's promulgation of the Final Rule.

DISCUSSION

In the interests of judicial economy and to avoid unnecessary duplication of effort and expenditure of time and resources, Petitioners respectfully request the Court to consolidate the above-referenced related case currently on the Court's docket. Consolidation is appropriate because the two cases arise from the same administrative proceeding and challenge the same final agency action. Moreover, the dispositive legal issues are largely the same in both challenges—to wit, did EPA illegally usurp authority granted to the State of Oklahoma under regulations promulgated pursuant the CAA and act in an arbitrary and capricious manner in promulgating the Regional Haze FIP?

Consolidation at this time will not disadvantage Respondents because EPA has not yet responded to either Petition for Review, nor has a briefing schedule been set in either of the pending actions. Moreover, consolidation will allow Petitioners to work together to attempt to limit duplicative briefing before the Court. Finally, OG&E supports consolidating both actions.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court consolidate the following related cases: Case No. 12-9526; Case No. 12-9527.

Date: March 20, 2012

Respectfully Submitted,

E. SCOTT PRUITT
OKLAHOMA ATTORNEY GENERAL

s/ P. Clayton Eubanks
P. Clayton Eubanks, OBA #16648
Assistant Attorney General
Thomas Bates, OBA Bar #15672
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ATTORNEYS FOR STATE OF OKLAHOMA AND OKLAHOMA INDUSTRIAL ENERGY CONSUMERS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 20, 2012, a true and correct copy of the above and foregoing instrument electronically filed with this Court and for mailed to the following:

Administrator Lisa P. Jackson
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Correspondence Control Unit
Office of General Counsel (2311)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Attorney General Eric H. Holder, Jr.
Office of the Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

s/ P. Clayton Eubanks

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N. E. 21ST
OKLAHOMA CITY, OK 73105

Administrator Lisa P. Jackson
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

A Communication from the Chief Legal Officers of the States of Alabama, Arizona, Arkansas, Georgia, Kansas, Kentucky, Nebraska, Utah, North Dakota and South Dakota

June 25, 2012

Hon. Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
EPA Headquarters - Ariel Ross Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington D.C. 20460

Submitted Electronically via: regulations.gov

RE: Proposed Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Generating Units: Docket ID No. EPA–HQ–OAR–2011–0660.

Dear Ms. Jackson:

As State Attorneys General, we appreciate the opportunity to submit the following comments on the Environmental Protection Agency's ("EPA") proposed Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Generating Units ("Greenhouse Gas NSPS").[1] The EPA should rescind this ill-advised proposal, and re-issue it only after the Agency devises an approach that accommodates all modes of energy generation.

The proposed Greenhouse Gas NSPS mandates stringent carbon caps on all new power plants. The only way new coal-fired power plants might achieve these caps is by employing Carbon Capture and Storage. Yet, even the Administration admits the earliest this technology might be commercially available is 2020.[2] Thus, EPA's proposed Greenhouse Gas NSPS effectively forbids the construction of new coal-fired power plants for the foreseeable future.

[1] 77 Fed. Reg. 22392 (Apr. 13, 2012).

[2] *Report of the Interagency Task Force on Carbon Capture and Storage* (Aug. 2010).

313 NE 21st Street • Oklahoma City, OK 73105 • (405) 521-3921 • Fax: (405) 521-6246

EPA projects, even absent the proposed rule's *de facto* ban on new coal-fired generation, no new coal-fired power plants will be built in the United States through 2030. Thus, EPA concludes the Greenhouse Gas NSPS will neither harm energy resources nor help the environment. As EPA succinctly explains in the proposed Greenhouse gas NSPS Regulatory Impact Analysis, the proposed rule "is highly likely to have no costs or benefits."[3] However minimal EPA may assess the benefit of its own regulations, outside analysts see significant impact resulting from the proposed Greenhouse Gas NSPS. Shortly after the proposed rule's publication, Moody's Investor Service, citing this and other EPA regulations against coal, downgraded the outlook of the U.S. coal industry to "negative."[4]

EPA's projections notwithstanding, the proposed rule will, in fact, significantly challenge small business owners, farmers, manufacturers, and other constituents in our States. The proposed Greenhouse Gas NSPS comes at a time when the Administration wants the country to pursue an "all of the above" energy strategy. Yet, the proposed rule takes coal off the table for new power plants, locking states out of future use of the country's most abundant domestic energy source. When the economy improves and energy demand increases, no new plants will be able to take advantage of this abundant and affordable fuel.

Sound energy policy calls for states to develop a diverse portfolio of coal, nuclear, natural gas, renewable, and other sources to guard against market and supply volatility. Many of the signatory states are leaders in the development of renewable energy and demand side management programs. Even so, these States believe that coal fired generation has to remain on the table as part of the "all of the above" strategy to meet the country's energy demands in a reliable and cost effective way. Instead, the proposed Greenhouse Gas NSPS forces states away from coal, increasing dependence on energy supplies that may not be technologically and economically feasible or would require extensive and vulnerable infrastructure. Such supplies could easily be disrupted, causing serious reliability concerns to the electrical grid.

We are further concerned the proposed Greenhouse Gas NSPS will not only undermine coal-fired power plants, but may also inadvertently challenge natural gas-fired electricity generation. EPA assumes market economics will make natural gas combined cycle power plants the predominant technology for new electric generation and claims 95% of such units built between 2006 and 2010 comply with the proposed rule.[5] However, a recent study by the University of California's Center for Energy and Environmental Economics found nearly 30% of natural gas combined cycle power plants planned for construction through 2017 will be unable to

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[3] ENV'T. PROT. AGENCY, *Regulatory Impact Analysis for the Proposed Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units* 1-2 (March, 2012).

[4] MOODY'S INVESTORS SERVICE, *Announcement: Moody's: US coal industry outlook turns negative on weak power demand* (May 8, 2012).

[5] 77 Fed. Reg. at 22414.

meet Greenhouse Gas NSPS requirements due to a trend towards smaller capacity.[6] The proposed Greenhouse Gas NSPS effectively forbids new coal use while imposing limits on the construction and operation of new natural gas combined cycle power plants. Such policy constrains our citizens' options to power their homes, businesses, and lifestyles.

Finally, we are concerned the Greenhouse Gas NSPS is a pretext for harmful carbon caps on existing power plants. Numerous existing power plants will need to undertake projects to comply with other new EPA regulations including the Cross State Air Pollution Rule and Utility MACT. EPA claims these projects will not trigger the Greenhouse Gas NSPS. Regardless whether that position ultimately proves correct, EPA has described the Greenhouse Gas NSPS as the first step towards creating greenhouse gas caps for existing power plants. Indeed, EPA has asserted that promulgating the Greenhouse Gas NSPS legally mandates the Agency to create new regulations capping carbon emissions from existing sources. Such regulations further undermine economic and energy security as the country struggles to rebound from recession.

States have a unique role in ensuring affordable, universal electric service and reliability while encouraging robust economic policy and responsible environmental protection. EPA's proposed Greenhouse Gas NSPS upsets this careful balance by preventing states from utilizing vital resources to supply the future energy its citizens will need to grow and prosper. As the chief legal officers of our States, we believe this unlawful and misguided rule will result in great harm to our citizens. Therefore, we ask EPA to withdraw the Greenhouse Gas NSPS until such time the Agency develops a proposal that properly accommodates all forms of fossil energy production.

Sincerely,

E. Scott Pruitt
Oklahoma Attorney General

[6] MATTHEW J. KOTCHEN AND ERIN T. MANSUR, *How Stringent is the EPA's Proposed Carbon Pollution Standard for New Power Plants?* 7 (Apr. 25, 2012) (University of California's Center for Energy and Environmental Economics is a joint venture of the UC Berkley Energy Institute and UC Santa Barbara Bren School of Environmental Science and Management.).

E. Scott Pruitt
Attorney General of Oklahoma
313 N.E. 21st
Oklahoma City OK 73105

Hon. Lisa P. Jackson
Administrator
U.S. Environmental Protection Agency
EPA Headquarters - Ariel Ross Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1101A
Washington D.C. 20460

20460

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

May 2, 2013

VIA CERTIFIED MAIL
& E-MAIL

Acting Administrator Bob Perciasepe
Office of the Administrator
United States Environmental
Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code:1101a
Washington, DC 20460
perciasepe.bob@epa.gov

Gina McCarthy
Assistant Administrator
Office of Air and Radiation
U.S. Environmental Protection Agency
EPA West
1200 Pennsylvania Avenue, NW
Mail Code: 6102T
Washington, DC 20460
McCarthy.gina@Epa.gov

Re: **A COMMUNICATION FROM THE STATES OF ALABAMA, ARIZONA, INDIANA, KANSAS, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH DAKOTA, TEXAS, WEST VIRGINIA AND WYOMING REGARDING POTENTIAL EPA SETTLEMENT NEGOTIATIONS WITH SEVEN NORTHEASTERN STATES REGARDING THE REGULATION OF METHANE EMISSIONS**

Dear Acting Administrator Perciasepe and Assistant Administrator McCarthy:

We are writing to express our very great concern that the Environmental Protection Agency (EPA), may consider negotiations with the States of New York, Connecticut, Delaware, Maryland, Rhode Island, Vermont and Massachusetts (collectively, the "Northeastern States") to resolve their notice of intent (NOI) to file suit under section 304 of the Clean Air Act for EPA's decision not to regulate methane emissions from new and existing oil and natural gas drilling, production and processing facilities ("oil and gas facilities") under the New Source Performance Standards (NSPS) program. EPA should not enter into negotiations with the Northeastern States because, as discussed below, their claims are entirely without merit.

EPA has appropriately declined to regulate methane emissions from new and existing oil and gas facilities under the Clean Air Act. EPA's NSPS are promulgated pursuant to Clean Air Act §111 (42 U.S.C. 7411). Under §111(b)(1)(B) of the Clean Air Act, EPA must review and revise, "if appropriate," NSPS standards every eight years. In

its recent review of oil and gas facility emissions and promulgation of new NSPS Subpart OOOO, EPA declined to regulate methane emissions from oil and gas facilities, stating that it would continue to evaluate these emissions.

In their NOI, the Northeastern States claim on several grounds that the EPA has erred. They first rely on language from Clean Air Act §109, and a court decision interpreting this §109 language, to argue that EPA was required to articulate a decision on whether or not regulation of methane under Subpart OOOO was appropriate. Section 109(d) requires EPA to "complete a thorough review" of air quality criteria and national ambient air quality standards (NAAQS) at five-year intervals.

This argument fails in light of the language of §111(b)(1)(B). While the §109(d) requirement that EPA "complete" a review may support a conclusion that EPA is required to articulate a determination at the conclusion of such review, the more permissive language of §111(b)(1)(B) that EPA simply review and revise NSPS standards, "if appropriate," compels no such conclusion. Moreover, §111(b)(1)(B) specifically provides that EPA need not review a NSPS standard if EPA determines that review "is not appropriate in light of readily available information on the efficacy of such standard." It is clear that the CAA §111 NSPS review requirements are quite different from the NAAQS §109(d) review requirements, and that EPA has much more discretion under §111 to review and revise NSPS standards. EPA's decision to continue to evaluate methane emissions from oil and gas facilities is entirely "appropriate" and consistent with the language of §111(b)(1)(B).

The Northeastern States also argue in their NOI that EPA was required to review and evaluate methane emissions from oil and gas facilities in their eight-year review of oil and gas facility emissions. But this argument cannot be squared with the law or existing practice. The intent of §111 arguably is, and the historical implementation of §111 by EPA certainly has been, focused on promulgation of standards for the criteria pollutants (NO_x, SO_x, CO, PM, ozone and lead) not methane. It is quite telling that the only examples cited by the Northeastern States in their NOI of EPA revising existing NSPS to include additional air pollutants were examples of EPA regulating additional criteria pollutants under an existing NSPS.

In addition, it is not clear that methane emissions from oil and gas facilities are major contributors of greenhouse gases. The Northeastern States admit in their NOI that oil and gas facilities are responsible for only 5 percent of the CO_{2e} annual emissions in the United States. More recent information from industry studies and state evaluations (e.g. the 2012 Texas Commission on Environmental Quality oil and gas emission factors study),

indicates that methane emissions from oil and gas facilities may be significantly lower than previous estimates. In fact, since the Northeastern States filed their NOI, the EPA Greenhouse Gas Inventory staff has reduced its methane emission estimates related to natural gas exploration and production significantly. However, the reductions are in only two of the thirty three relevant emission categories. Not yet addressed is EPA's estimate for methane emissions from well completions with hydraulic fracturing which are related to the recent NSPS Subpart OOOO rulemaking cited by the Northeastern States. This single category represents the largest contribution to the overall natural gas production sector emissions estimate, but it has been assessed by industry and academia to be inaccurate. The justification for those estimates has been challenged by mounting evidence, including voluminous data, and investigation of potential flaws in the statistical methodology.

Finally, the Northeastern States' NOI does not adequately acknowledge the extent to which methane emissions from oil and gas facilities are controlled by existing EPA NSPS and other regulations. EPA's reduced emission completion requirements for gas wells in the recently promulgated Subpart OOOO would certainly capture and reduce methane emissions, as would the Subpart OOOO emission control requirements for storage vessels. Emissions from compressors and engines are already subject to separate NSPS (Subparts IIII and JJJJ) and methane emissions from compressor blowdowns are regulated under EPA or state startup, shutdown and maintenance (SSM) regulations or permits. In fact, the Northeastern States NOI admits that methane emissions from oil and gas facilities are adequately controlled by including an EPA statement that many of the (over 100) methane control technologies and practices identified by the joint EPA and industry Natural Gas STAR program have been implemented by industry.

In sum, regulation of methane emissions from oil and gas facilities is not "appropriate" under the analysis contemplated by § 111(b)(1)(B) and methane emissions from oil and gas facilities are being controlled in any event, in compliance with existing regulations implemented by producing states and as a result of voluntary industry efforts. Given all this, it is abundantly clear that EPA should not succumb to the pressure intended by the Northeastern States' NOI and undertake negotiations with them on this issue.

But even should EPA disagree on the merits of the Northeastern States' claims, any negotiations should include other states that actually have oil and gas operations and facilities. Any discussions or negotiations with the Northeastern States to regulate methane emissions from oil and gas facilities would obviously have a significant impact on the economy and citizens of those States. Moreover, regulating methane emissions under the NSPS program would be a marked departure from EPA's historical practice and could

therefore require significant additional resources to implement at a time when state resources are already strained and overburdened. For all these reasons, EPA must at a minimum include Oklahoma and other states with similar interests in any negotiations with the Northeastern States.

Sincerely,

E. Scott Pruitt
OKLAHOMA ATTORNEY GENERAL

Luther Strange
Attorney General
State of Alabama

Tom Horne
Arizona Attorney General

Thomas W. Easterly, Commissioner
Indiana Department of Environmental Management

Derek Schmidt
Attorney General
State of Kansas

Tim Fox
Attorney General
State of Montana

Jon Bruning
Attorney General
State of Nebraska

Wayne Stenehjem
Attorney General
State of North Dakota

MICHAEL DEWINE
ATTORNEY GENERAL
STATE OF OHIO

Marty Jackley
Attorney General
State of South Dakota

Gregg Abbott
Attorney General
State of Texas

Patrick Morrisey
Attorney General
State of West Virginia

Gregory A. Phillips
Attorney General
State of Wyoming

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OKLAHOMA CITY OK 73105

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Acting Administrator Bob Perciasepe
Office of the Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code:1101a
Washington, DC 20460

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 2 8 2013

OFFICE OF
AIR AND RADIATION

Mr. E. Scott Pruitt
Attorney General, State of Oklahoma
313 NE 21st Street
Oklahoma City, Oklahoma 73105

Dear Mr. Pruitt:

Thank you for your letter of May 2, 2013, to the U.S. Environmental Protection Agency concerning the notice of intent (NOI) to file suit that the EPA has received from New York, Connecticut, Delaware, Maryland, Rhode Island, Vermont and Massachusetts regarding the regulation of methane emissions from the oil and gas sector.

We are currently evaluating the NOI. We value the input you have provided and will take it into consideration as our evaluation proceeds. I would like to assure you that we recognize and value the substantive concerns you have raised and we will certainly take them fully into consideration as we weigh our response, if any, to the NOI. We also understand that the oil and gas sector is active within the state you serve, and that decisions regarding the NOI will be important to you and to your state. Indeed, the oil and gas sector is vital to our nation's economy and not just to that of your state.

Again, thank you for your letter. I appreciate the opportunity to be of service and trust the information provided is helpful.

Sincerely,

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 2 8 2013

OFFICE OF
AIR AND RADIATION

Mr. Gregg Abbott
Attorney General, State of Texas
Post Office Box 12548
Austin, Texas 78711

Dear Mr. Abbott:

Thank you for your letter of May 2, 2013, to the U.S. Environmental Protection Agency concerning the notice of intent (NOI) to file suit that the EPA has received from New York, Connecticut, Delaware, Maryland, Rhode Island, Vermont and Massachusetts regarding the regulation of methane emissions from the oil and gas sector.

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Again, thank you for your letter. I appreciate the opportunity to be of service and trust the information provided is helpful.

Sincerely,

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 2 8 2013

OFFICE OF
AIR AND RADIATION

Mr. Jon C. Bruning
Attorney General, State ofNebraska
Post Office Box 98920
Lincoln, Nebraska 68509

Dear Mr. Bruning:

Thank you for your letter of May 2, 2013, to the U.S. Environmental Protection Agency concerning the notice of intent (NOI) to file suit that the EPA has received from New York, Connecticut, Delaware, Maryland, Rhode Island, Vermont and Massachusetts regarding the regulation of methane emissions from the oil and gas sector.

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Sincerely,

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 2 8 2013

OFFICE OF
AIR AND RADIATION

Mr. Michael DeWine
Attorney General, State of Ohio
30 E. Broad Street
Columbia, Ohio 43266

Dear Mr. DeWine:

Thank you for your letter of May 2, 2013, to the U.S. Environmental Protection Agency concerning the notice of intent (NOI) to file suit that the EPA has received from New York, Connecticut, Delaware, Maryland, Rhode Island, Vermont and Massachusetts regarding the regulation of methane emissions from the oil and gas sector.

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Sincerely,

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 2 8 2013

OFFICE OF
AIR AND RADIATION

Mr. Thomas W. Easterly
Commissioner, State of Indiana
100 North Senate Avenue
Indianapolis, Indiana 46204

Dear Mr. Easterly:

Thank you for your letter of May 2, 2013, to the U.S. Environmental Protection Agency concerning the notice of intent (NOI) to file suit that the EPA has received from New York, Connecticut, Delaware, Maryland, Rhode Island, Vermont and Massachusetts regarding the regulation of methane emissions from the oil and gas sector.

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Sincerely,

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 2 8 2013

OFFICE OF
AIR AND RADIATION

Mr. Tim Fox
Attorney General, State of Montana
215 N. Sanders Street
Helena, Montana 59601

Dear Mr. Fox:

Thank you for your letter of May 2, 2013, to the U.S. Environmental Protection Agency concerning the notice of intent (NOI) to file suit that the EPA has received from New York, Connecticut, Delaware, Maryland, Rhode Island, Vermont and Massachusetts regarding the regulation of methane emissions from the oil and gas sector.

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Sincerely,

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 2 8 2013

OFFICE OF
AIR AND RADIATION

Mr. Marty Jackley
Attorney General, State of S. Dakota
1302 East Highway 14
Pierre, South Dakota 57501

Dear Mr. Jackley:

Thank you for your letter of May 2, 2013, to the U.S. Environmental Protection Agency concerning the notice of intent (NOI) to file suit that the EPA has received from New York, Connecticut, Delaware, Maryland, Rhode Island, Vermont and Massachusetts regarding the regulation of methane emissions from the oil and gas sector.

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Again, thank you for your letter. I appreciate the opportunity to be of service and trust the information provided is helpful.

Sincerely,

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 2 8 2013

OFFICE OF
AIR AND RADIATION

Mr. Patrick Morrisey
Attorney General, State of W. Virginia
Capital Bldg. Room 1 E-26
Charleston, West Virginia 25302

Dear Mr. Morrisey:

Thank you for your letter of May 2, 2013, to the U.S. Environmental Protection Agency concerning the notice of intent (NOI) to file suit that the EPA has received from New York, Connecticut, Delaware, Maryland, Rhode Island, Vermont and Massachusetts regarding the regulation of methane emissions from the oil and gas sector.

We are currently evaluating the NOI. We value the input you have provided and will take it into consideration as our evaluation proceeds. I would like to assure you that we recognize and value the substantive concerns you have raised and we will certainly take them fully into consideration as we weigh our response, if any, to the NOI. We also understand that the oil and gas sector is active within the state you serve, and that decisions regarding the NOI will be important to you and to your state. Indeed, the oil and gas sector is vital to our nation's economy and not just to that of your state.

Again, thank you for your letter. I appreciate the opportunity to be of service and trust the information provided is helpful.

Sincerely,

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 2 8 2013

OFFICE OF
AIR AND RADIATION

Mr. Gregory Phillips
Attorney General, State of Wyoming
State Capital Building
Cheyenne, Wyoming 82002

Dear Mr. Phillips:

Thank you for your letter of May 2, 2013, to the U.S. Environmental Protection Agency concerning the notice of intent (NOI) to file suit that the EPA has received from New York, Connecticut, Delaware, Maryland, Rhode Island, Vermont and Massachusetts regarding the regulation of methane emissions from the oil and gas sector.

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Again, thank you for your letter. I appreciate the opportunity to be of service and trust the information provided is helpful.

Sincerely,

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 28 2013

OFFICE OF
AIR AND RADIATION

Mr. Derek Schmidt
Attorney General, State of Kansas
Memorial Hall, 120 SW 10th Street
Topeka, Kansas 66612

Dear Mr. Schmidt:

Thank you for your letter of May 2, 2013, to the U.S. Environmental Protection Agency concerning the notice of intent (NOI) to file suit that the EPA has received from New York, Connecticut, Delaware, Maryland, Rhode Island, Vermont and Massachusetts regarding the regulation of methane emissions from the oil and gas sector.

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Again, thank you for your letter. I appreciate the opportunity to be of service and trust the information provided is helpful.

Sincerely,

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 2 8 2013

OFFICE OF
AIR AND RADIATION

Mr. Wayne Stenehjem
Attorney General, State of North Dakota
600 E. Boulevard Avenue
Bismark, North Dakota 58505

Dear Mr. Stenehjem:

Thank you for your letter of May 2, 2013, to the U.S. Environmental Protection Agency concerning the notice of intent (NOI) to file suit that the EPA has received from New York, Connecticut, Delaware, Maryland, Rhode Island, Vermont and Massachusetts regarding the regulation of methane emissions from the oil and gas sector.

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Again, thank you for your letter. I appreciate the opportunity to be of service and trust the information provided is helpful.

Sincerely,

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 2 8 2013

OFFICE OF
AIR AND RADIATION

Mr. Luther Strange
Attorney General, State of Alabama
501 Washington Avenue
Montgomery, Alabama 36130

Dear Mr. Strange:

Thank you for your letter of May 2, 2013, to the U.S. Environmental Protection Agency concerning the notice of intent (NOI) to file suit that the EPA has received from New York, Connecticut, Delaware, Maryland, Rhode Island, Vermont and Massachusetts regarding the regulation of methane emissions from the oil and gas sector.

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Again, thank you for your letter. I appreciate the opportunity to be of service and trust the information provided is helpful.

Sincerely,

Gina McCarthy
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 2 8 2013

OFFICE OF
AIR AND RADIATION

Mr. Tom Horne
Attorney General, State of Arizona
1275 W. Washington Street
Phoenix, Arizona 85007

Dear Mr. Horne:

Thank you for your letter of May 2, 2013, to the U.S. Environmental Protection Agency concerning the notice of intent (NOI) to file suit that the EPA has received from New York, Connecticut, Delaware, Maryland, Rhode Island, Vermont and Massachusetts regarding the regulation of methane emissions from the oil and gas sector.

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Again, thank you for your letter. I appreciate the opportunity to be of service and trust the information provided is helpful.

Sincerely,

Gina McCarthy
Assistant Administrator

DAILY READING FILE

Gaines, Cynthia

From: Metzger, Philip
Sent: Friday, May 31, 2013 5:32 PM
To: Gaines, Cynthia
Subject: FW: FOIA Request; EPA HQ-2013-003886 Oklahoma Response to EPA Request for Additional Time to Respond
Attachments: EPA FOIA Request EPA-HQ-2013-003886 Oklahoma Response to Request for Additional Time.pdf

Philip C. Metzger
Counselor to the Deputy Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W., MC 1101A
Washington, DC 20460
(202) 564-3776

----- Forwarded by Philip Metzger/DC/USEPA/US on 05/31/2013 04:05 PM -----

From: Clayton.Eubanks@oag.ok.gov
To: Bob Perciasepe/DC/USEPA/US@EPA, Lynn Kelly/DC/USEPA/US@MSO365
Date: 05/28/2013 04:27 PM
Subject: FOIA Request; EPA HQ-2013-003886 Oklahoma Response to EPA Request for Additional Time to Respond

---

Dear Acting Administrator Perciasepe and Attorney-Advisor Kelley:

Attached please find a letter from Oklahoma Attorney General Scott Pruitt regarding FOIA Request EPA HQ-2013-003886.

Thank you in advance for your attention to this matter.

P. Clayton Eubanks
Deputy Solicitor General
Office of the Attorney General of Oklahoma
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(See attached file: EPA FOIA Request EPA-HQ-2013-003886 Oklahoma Response to Request for Additional Time.pdf)

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

May 28, 2013

VIA REGULAR MAIL
& E-MAIL

The Honorable Bob Perciasepe
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
bob.perciasepe@epa.gov

Lynn Kelley, Attorney-Advisor
U.S. Environmental Protection Agency
Office of General Counsel
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Mail Code: 2377A
Washington, D.C. 20460
kelly.lynn@epa.gov

Re: Response to May 15, 2013, E-Mail
FREEDOM OF INFORMATION ACT APPEAL
Appeal of Fee Waiver Denial Pursuant to 40 C.F.R. §2.104(j)
FOIA Request No. EPA-HQ-2013-003886

Dear Acting Administrator Perciasepe and Ms. Kelly:

On February 6, 2013, the States of Oklahoma, Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah, and Wyoming submitted to the United States Environmental Protection Agency ("EPA") a Freedom of Information Act (5 U.S.C. §552, as amended) request for records concerning EPA's negotiations with certain non-governmental organizations that have led to binding consent decrees that dictate how EPA must proceed concerning various States' Regional Haze State Implementation Plans ("SIPs"). See Attachment "1" for a copy of the States' February 6, 2013, request.

Oklahoma and the other States seek this information out of substantial concern with EPA's practice because it directly results in minimizing the substantive role of the States in many energy, land use and environmental regulatory programs in a manner that is contrary to the cooperative federalism structure set forth in federal law and the United States Constitution. EPA must be transparent about its actions.

Clearly set forth in Oklahoma's FOIA request was a fee waiver request based on the fact that Oklahoma's request is in the public interest and, therefore, EPA must waive any applicable fees

associated with fully responding to the request. See 40 C.F.R. § 2.107(l). By letter dated February 22, 2013, EPA denied Oklahoma's fee waiver request. See Attachment 2. Oklahoma filed timely on March 15, 2013 its appeal of EPA's denial. See Attachment 3. Since the denial of Oklahoma's fee waiver request, EPA has demonstrated no good faith efforts to respond to Oklahoma and the other States' inquiry into EPA's actions.

By email dated May 2, 2013, EPA stated that it required "a brief extension of time" until May 15, 2013 to complete its review and response to Oklahoma's March 15 appeal. See Attachment 4. On May 15, 2013, EPA sent my office an email informing Oklahoma that EPA required yet another extension of time until May 31, 2013 to complete its review and issue a determination of whether Oklahoma's fee waiver request should be granted. See Attachment 5.

Oklahoma and the eleven other requesting States have been waiting since February to hear from EPA on whether the States' fee waiver request will be granted. EPA's continued delay to grant Oklahoma's fee waiver request - and provide the information Oklahoma and the eleven other States seek - is wholly inexcusable. The State of Oklahoma has clearly demonstrated that its request meets the fee waiver criteria under FOIA. As fully explained in Oklahoma's March 15 appeal, all of the information requested to be disclosed by EPA will significantly contribute to the public's understanding of the operations and activities of EPA and will not be used to further any commercial interest. Further, the information contained in the requested EPA records will be made available free of charge to the public via the Internet and at public libraries located in Oklahoma and the eleven other requesting States.

EPA's inexcusable delay here is further troubling given the fact that EPA repeatedly - 92 percent of the time according to a recent study by the Competitive Enterprise Institute ("CEI") - grants fee waiver requests from non-governmental organizations like those that have entered into the binding consent decrees that are at issue in the pending FOIA request. However, CEI's study found that EPA denies a majority of the fee waiver requests made from groups seeking public records so as to understand whether EPA is faithfully complying with applicable law.

Oklahoma expects EPA to act reasonably and grant its fee waiver request by May 31. Should EPA deny Oklahoma's valid and well-supported fee waiver request because the States seek to understand why EPA has been engaging in activity that ignores the role of the States in developing and implementing significant and far reaching policy and law, Oklahoma will act promptly to compel EPA's compliance with applicable law.

Sincerely,

Scott Pruitt

E. Scott Pruitt
Attorney General

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

February 6, 2013

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

FREEDOM OF INFORMATION ACT REQUEST

Freedom of Information Officer
U.S. EPA, Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Hq.foia@epa.
FOIA REQUEST

Dear Sir or Madam:

This is a request under the Freedom of Information Act (5 U.S.C. § 552, as amended).

By this letter the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah and Wyoming ("**Requesting States**") are requesting any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2009, to the date of this letter that discuss or in any way relates to:

(a) any consideration, proposal or discussions with any Interested Organization (as that term is defined below), or any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy ("**Other Organizations**"), concerning:

i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act ("**CAA**"), 42 U.S.C. § 7604(a)(2);

313 N.E. 21ST STREET • OKLAHOMA CITY, OK 73105 • (405) 521-3921 • FAX: (405) 521-6246

ii. the course of action to take with respect to any Regional Haze State Implementation Plan ("**SIP**") required to be submitted to the U.S. Environmental Protection Agency ("**EPA**") pursuant to CAA § 169A for any State;

iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP (the "**Subject**").

"**Interested Organizations**" is defined as any one of the following organizations:

- National Parks Conservation Association
- Montana Environmental Information Center
- Grand Canyon Trust
- Dine Citizens Against Ruining Our Environment
- Dakota Resource Council
- Dacotah Chapter of Sierra Club
- San Juan Citizens Alliance
- Our Children's Earth Foundation
- Plains Justice
- Powder River Basin Resource Council
- Sierra Club
- Environmental Defense Fund
- Wildearth Guardians
- Natural Resources Defense Council
- Western Resource Advocates
- Wyoming Outdoor Council
- Greater Yellowstone Coalition

(b) Copies of any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) sent or received by the following EPA offices:

i. the Office of the Administrator;
ii. the Office of Environmental Information;
iii. the Office of General Counsel;
iv. the Office of Inspector General;

v. the Office of International and Tribal Affairs;
vi. the Office of Research and Development;
vii. Region 1;
viii. Region 2;
ix. Region 3;
x. Region 4;
xi. Region 5;
xii. Region 6;
xiii. Region 7;
xiv. Region 8;
xv. Region 9; or
xvi. Region 10.

(including receipt by carbon copy or blind carbon copy), regarding the Subject including, but not limited to, documents sent by or received from individuals representing or employed by the Interested Organizations or Other Organizations.

Reason for FOIA Request

Over the past three years, the EPA has allowed its regulatory agenda to be largely defined by litigation settlements it has entered into with environmental organizations. Specifically, on at least forty-five occasions, EPA and other federal agencies have settled lawsuits (which included paying plaintiffs' attorneys' fees) brought under the CAA. These settlements take the form of binding Consent Decrees that dictate how and when EPA and other federal agencies must develop stringent new regulations. Unfortunately, States responsible for implementing many of these regulations have little knowledge of or input in this process, which is not consistent with the cooperative federalism structure of federal environmental law.

Out of the forty-five settlements that have been made public, EPA has paid almost $1 million in attorneys' fees to these groups, while also committing to develop a suite of sweeping new regulations. One EPA Consent Decree led to the promulgation of EPA's costliest regulation ever - the Mercury Air Toxics Standards (MATS). Other Consent Decrees include obligations that define how and when EPA acts on forty-five individual State Regional Haze SIPs – including the imposition of proposed federal implementation plans ("**FIPs**").

Many Consent Decrees authorize EPA to act in a way that is not consistent with current law. For example, Regional Haze Consent Decrees allowed EPA to propose combined Regional Haze SIPs/FIPs – something EPA has not done before in administering the CAA.

This is detrimental to the States and "unwinds" the State and federal partnership contained in the CAA.

States affected by these non-governmental organization lawsuits are not included as parties in the suits and when affected States try to intervene, EPA and the environmental groups frequently oppose State intervention. For instance, when the State of North Dakota sought to intervene in *Wildearth Guardians v. Jackson* in the U.S. District Court for the Northern District of California (where Wildearth Guardians filed its suit), EPA opposed the intervention despite the fact that the case involved how and when EPA should act on North Dakota's proposed Regional Haze SIP. *Wildearth Guardians v. Jackson*, No. C-09-2453-CW, 2011 U.S. Dist. LEXIS 14378 (N.D. Cal. Dec. 27, 2011) (order denying North Dakota's intervention).

State Attorneys General from the Requesting States are in the process of evaluating EPA's alarming practice of relying on Consent Decrees to deny the States their important role as a partner with EPA in implementing federal environmental law. Not only does EPA's action harm and jeopardize the States' role as a partner with EPA, but it harms the interests of the citizens of the Requesting States. Our citizens rely on and expect the States to implement federal environmental law. Often, these implementation efforts require the States to design plans to meet the individual circumstances of the State, while protecting and advancing the environmental goals and requirements of federal environmental law. When EPA coordinates with non-governmental organizations regarding how federal environmental law should be applied and implemented in an individual State and excludes the State from that effort the State and its citizens are harmed.

Rather than make individual FOIA requests, the Requesting States are making one request for the release of documents with the Interested Organizations and Other Organizations concerning the Subject. The Requesting States have lobbied, litigated, and publicly commented on federal actions which directly affect their individual State interests and those of their citizens. The requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States.

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA's operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

Fee Waiver Request

The Requesting States request that you waive any applicable fees since disclosure meets the standard for waiver of fees as it is in the public interest. *See* 40 C.F.R. § 2.107(l). Specifically, this request concerns "the operations or activities of the government;" disclosure is "likely to contribute" to an understanding of government operations or activities; disclosure will contribute to "public understanding;" the disclosure is likely to contribute "significantly" to public understanding of government operations and activities; and the States have no commercial interest in disclosure of the documents – the Requesting States' interest is to facilitate and promote the public interest. 40 C.F.R. § 2.107(2)(i),(iv).

Reasons for Granting the Fee Waiver Request

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA's operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

The Requesting States plan to make these documents available to the public at the University, Federal Depository and State Library systems ("**Library Systems**") in the respective Requesting States. As these facilities are open to the general public, many people will thereby have access to the information contained in the materials which are the subject of this request. Most, if not all, of these Libraries also serve as a Federal Depository. Federal Depository Libraries were "established by Congress to ensure that the American public has access to its Government's information." http://www.gpo.gov/libraries/. As Federal Depositories, these libraries ensure that the agency publications and other information "are highly visible to the public, promoted, and safeguarded." *Id.* Moreover, making available the requested Subject information and report at University Libraries will facilitate the teaching and research occurring at these Universities on important public policy issues including cooperative federalism and the State federal partnership. None of the requested Subject information or the resulting report will be used for commercial use or gain.

A. Legal Standard for Fee Waivers

FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver test "should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver. *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1039 (D. Id. 2004). FOIA imposes a non-discretionary duty to provide documents without any charge if the disclosed information

satisfies a two-prong test established by statute. *Fed. CURE v. Lappin*, 602 F.Supp. 2d 197, 202 (D.D.C. 2009) (documents "*shall* be furnished without any charge" if two-prong test is satisfied (emphasis and omission in original)). First, the disclosed information must be likely to significantly contribute to public understanding of governmental operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii). Second, the disclosed information cannot be primarily in the commercial interests of the requester. *Id.*

EPA has promulgated regulations detailing the specific factors it considers when evaluating the two-prong statutory test for fee waiver requests. 40 C.F.R. § 2.107(*l*)(2)-(3). EPA's regulations elucidate further that to be granted fee waiver requests a requester must establish that the information requested for disclosure must pertain to and significantly contribute to the public understanding of governmental operations and activities. As this FOIA Request demonstrates, the Requesting States have clearly met all of the statutory and regulatory requirements necessary to be granted a fee waiver.

1. First Factor: The FOIA Request is for Records Concerning EPA's Operations and Activities.

The Subject information the Requesting States seek directly concerns the operations and activities of EPA. 40 C.F.R. § 2.107(*l*)(2)(i). Specifically, the FOIA Request seeks information directly related to EPA's operations and activities related to its implementation and enforcement of the CAA through negotiated settlements with non-governmental organizations. These settlements directly imposed standards upon and/or required the State to take certain actions under the federal environmental program at issue in the lawsuit or administrative action.

In its enforcement of these federal programs through settlements with non-governmental organizations, EPA is using public funds and resources. The Tenth Circuit held that a federal agency's expenditure of public funds and resources was an operation and activity of that agency satisfying the first factor of the public interest prong. *Forest Guardians*, 416 F.3d at 1178; *see also Edmonds Inst. v. DOI*, 460 F. Supp. 2d 63, 66-67 (D.D.C. 2006). Similarly, EPA has devoted public funds to paying attorneys' fees and devoted public resources to negotiating and enforcing the settlements. Clearly, the Requesting States meet the first factor as the requested Subject information concerns the "operations or activities of the government." 40 C.F.R. § 2.107(*l*)(2)(i).

2. Second Factor: The FOIA Request Seeks Meaningful Information That Contributes to an Increased Public Understanding about EPA's Operations or Activities Regarding the CAA and SIPs.

In considering whether to grant the Requesting States fee waiver request, EPA must determine whether the requested Subject information is meaningfully informative and likely to contribute to an increase in public understanding about those operations or activities. 40 C.F.R. § 2.107(*l*)(2)(ii). The Requesting States FOIA Request seeks information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest. How a federal agency interacts with non-governmental interests in the formation of policy has been identified as an "issue of the utmost importance." *NRDC v. United States EPA*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). And "an understanding of how [a federal agency] makes policy decisions, including the **influence of any outside groups on this process**, is also important to the public's understanding of the [government]. *Forest Guardians*, 416 F.3d at 1179-80. (emphasis added).

With the release of this meaningful information the Requesting States will use it to educate the public about how EPA has elected to resolve litigation and administrative actions which directly affect the formation of current and future federal environmental policy. In *Western Watersheds v. DOI*, the U.S. District Court determined the requesting party satisfied the second factor by requesting information that it would use to educate the public about an agency's decision-making and its intent to create a summary of such information that was reader-friendly. 318 F. Supp. 2d at 1040-41. The U.S. District Court for the District of Columbia reached the same result in *Federal CURE* in holding the requesting party's intent to analyze and synthesize the requested information into a report relayed to the public via email and internet satisfied the second factor of the public interest prong. 602 F. Supp. 2d at 202-03. As explained in this FOIA Request, the Requesting States will prepare a report summarizing the Subject information which will be made available to the general public through the States' websites and the Library Systems of the Requesting States.

3. Third Factor: The FOIA Request Seeks Information That Contributes to the Understanding of a Broad Audience of Persons Interested in EPA's Operations or Activities Regarding the CAA and SIPs.

To satisfy the third factor, the requesting party must show that the requested information contributes to the understanding of a broad audience of persons interested in the subject. 40 C.F.R. § 2.107(*l*)(2)(iii). In *Forest Guardians*, the Court held that the requesting party satisfied the third factor by demonstrating its intent to broadly disseminate the compiled information, which was only available in piecemeal and hard-to-access form. *Forest Guardians*, 416 F.3d at 1181-82. As in *Forest Guardians*, the Requesting States seek piecemeal information that is held in a number of EPA's regional or other offices throughout the nation and which information cannot be easily accessed. The requested information relates to EPA's communications and documentation in a large number of discrete lawsuits and enforcement actions. *Id.* (holding information in court houses,

newspaper articles, and affidavits not sufficient to justify denying a fee waiver). The Requesting States will then compile and summarize this information into an easily accessible and readable report for their citizens and distribute copies of the report to Congress and the media.

As detailed above, the Requesting States intend to disseminate the requested information by making the report as well as the underling information publicly available on the Requesting States' websites as well as through the Library Systems of each of the Requesting States. Because the report will be posted on State government websites any American with access to the internet will have access to the report. Accordingly, the report will be available to better inform **all** U.S. citizens on matters affecting EPA's operations and policy formation. *See Judicial Watch Inc. v. U.S. DOI*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000) (requesting party's concrete plan or specific intent for publication and other dissemination of requested information demonstrates compliance with third factor). Further, the Requesting States stature as representatives of their respective citizens and accountability to their citizens to provide information affecting each State's implementation of the CAA demonstrates that the Requesting States can and will disseminate the requested information to a broad group of interested persons. *See Fed. CURE*, 602 F. Supp. 2d at 204 (stature of largest public advocacy group demonstrated ability to disseminate information to reasonably broad group).

Finally, the Requesting States will use the report to educate State and federal lawmakers regarding the activities of EPA in negotiating settlements with non-governmental organizations that directly affect current and future federal environmental policy. The report will provide invaluable information to these lawmakers as they consider future changes to environmental programs that will affect all Americans.

4. Fourth Factor: The FOIA Request Seeks Information That will Significantly Enhance the Public's Understanding of EPA's Operations or Activities Regarding the CAA and SIPs.

The intention of FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," *NRDC* at 496 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The Requesting States are seeking the Subject information so as to significantly enhance the public's understanding of EPA's operations and activities and to ensure that the public has the information necessary to determine whether EPA's actions in entering into settlements with non-governmental organizations are prudent or thwart the cooperative federalism approach embodied in many of the federal environmental programs. 40 C.F.R. § 2.107(*l*)(2)(iv). Further, the public currently has no access to the requested Subject information. Only with disclosure of the requested Subject information will the public's understanding of EPA's operations and activities be greater than "as compared to

the level of public understanding existing prior to the disclosure." 40 C.F.R. § 2.107(*l*)(2)(iv).

As detailed above, the Requesting States intend to prepare a report on EPA's decision-making process in negotiating and entering into certain litigation settlements and how these settlements are affecting current and future environmental policy. In taking the Subject information, which is not in the public domain, compiling it, and disseminating it to the public in easily accessible forums, the Requesting States meet the fourth factor. *Fed. CURE*, 602 F. Supp. 2d at 204-05. Clearly, the "public's understanding of EPA decision making will be significantly enhanced by learning about the nature and scope of EPA communication[s]" and as such the Requesting States fee waiver request must be granted. *NRDC* at 501.

B. The Requesting States' FOIA Request Satisfies the Commercial-Interest Prong of the Fee Waiver Test.

In considering whether the second prong of the public interest fee waiver test is met, EPA considers the existence and magnitude of the requesting party's commercial interest in the requested information and whether the commercial interest outweighs the public interest. 40 C.F.R. § 2.107(*l*)(3). The Requesting States are exclusively comprised of State governments, which are noncommercial entities that have no commercial interest in the disclosure of information regarding the manner in which EPA operates. *See Fed. CURE*, 602 F. Supp. 2d at 201 (recognizing non-profit organization is a non-commercial entity entitled to fee waiver). The Requesting States' intended use of the requested Subject information is to make the information available—free of charge—to their respective citizens in a readable, summarized fashion. The States have no intention of using the information disclosed for financial gain. Nor does making the information available to the public create a commercial interest for the Requesting States. Further, the public interest in disclosure necessarily is greater in magnitude than that of the Requesting States' complete lack of commercial interest in the requested information. 40 C.F.R. § 2.107(*l*)(3)(ii). The Requesting States have no commercial interest in the information requested and therefore satisfy the second prong of the fee waiver test.

In light of the ongoing and contentious public policy controversy regarding EPA's coordination and planning its regulatory agenda with non-governmental organizations, the Requesting States note that time is of the essence in this matter. There is a great need for prompt disclosure so that the released information may more adequately inform public understanding and discussion of EPA's actions.

In the event that access to any of the requested records is denied, please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We therefore request that the Requesting States be provided with all

non-exempt portions which are reasonably segregable. We further request that you describe the deleted material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies in this instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination, and in formulating arguments in case an appeal is taken. The EPA's written justification might also help to avoid unnecessary litigation. We of course reserve the right to appeal the withholding or deletion of any information and expect that you will list the office and address were such an appeal can be sent.

If for some reason, the fee waiver request is denied, while reserving my right to appeal such a decision, the Requesting States are willing to pay $5.00 (five dollars) to cover costs of document search and duplication.

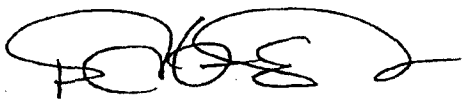
Access to the requested records should be granted within twenty (20) working days from the date of your receipt. Failure to respond in a timely manner shall be viewed as a denial of this request and the requesters may immediately file an administrative appeal.

Finally, the Requesting States ask that all correspondence regarding this FOIA request and all documents produced in response to this request be directed to the Attorney General of the State of Oklahoma.

Thanking you in advance for your prompt reply.

Sincerely,

E. Scott Pruitt
OKLAHOMA ATTORNEY GENERAL



P. Clayton Eubanks
DEPUTY SOLICITOR GENERAL
Office of Oklahoma Attorney General
(405) 522-8992 Fax (405) 522-0608
clayton.eubanks@oag.ok.gov

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

February 22, 2013

OFFICE OF
ENVIRONMENTAL INFORMATION

Mr. P. Clayton Eubanks
Deputy Solicitor General
Office of Oklahoma Attorney General
313 N. E. 21st Street
Oklahoma City, OK 73105

RE: Request Number EPA-HQ-2013-003886

Dear Mr. Eubanks:

This is in response to your request for a waiver of fees in connection with your Freedom of Information Act (FOIA) request to the U.S. Environmental Protection Agency (EPA) seeking a copy of records from the January 1, 2009 to February 6, 2013 regarding the scope and application of the non-discretionary duty to take certain action under the Clear Air Act; the course of action to take with respect to any Regional Haze State Implementation Plan; and other records as described in your request.

We have reviewed your fee waiver justification and based on the information provided, we are denying your request for a fee waiver. You have not expressed a specific intent to disseminate the information to the general public. As a result of you failing to meet the above criteria, accordingly, there is no need to address the remaining prongs of the fee waiver criteria. If the estimated cost exceeds $25.00 the Office of Air and Radiation will contact you regarding the cost of processing your request and seek an assurance of payment. They will be unable to process your request until they receive your written assurance of payment.

Under the FOIA, you have the right to appeal this determination to the National Freedom of Information Office, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, NW (2822T), Washington, DC 20460 (U.S. Postal Service Only), E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania

2

Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, NW, Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI number listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Should you choose to appeal this determination, please be sure to fully address all factors required by EPA's FOIA Regulations, located at 40 C.F.R. § 2.107(l) in your appeal. If you have any questions concerning this determination please contact me at (202) 566-1667.

Sincerely,

Larry F. Gottesman
National FOIA Officer

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

March 15, 2013

VIA US CERTIFIED MAIL
RETURN RECEIPT REQUESTED,
FACSIMILE & E-MAIL

National Freedom of Information Officer
United States EPA
FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Fax: 202-566-2147
Email: Hq.foia@epa

Re: FREEDOM OF INFORMATION ACT APPEAL
Appeal of Fee Waiver Denial Pursuant to 40 C.F.R. § 2.104(j)
FOIA Request No. EPA-HQ-2013-003886

Dear Sir or Madam:

This is a timely appeal of the U.S. Environmental Protection Agency's ("**EPA**") improper denial of the Oklahoma Attorney General's request for a fee waiver in connection with the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah and Wyoming's ("**Requesting States**") February 6, 2013, Freedom of Information Act ("**FOIA**") request No. EPA-HQ-2013-003886. ("**FOIA Request**"). For the reasons stated in the FOIA Request, the Requesting States ask that this appeal be given expedited review.

I. BACKGROUND

As detailed in the FOIA Request, the Requesting States seek any and all documents regarding any consideration, proposal or discussions between the EPA Administrator with any Interested Organization or Other Organizations[1] concerning:

i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act ("**CAA**"), 42 U.S.C. § 7604(a)(2);

[1] Interested Organization and Other Organizations are defined in the Requesting States FOIA Request.

ii. the course of action to take with respect to any Regional Haze State Implementation Plan ("**SIP**") required to be submitted to the U.S. Environmental Protection Agency ("**EPA**") pursuant to CAA § 169A for any State;

iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP (the "**Subject**").

A copy of the FOIA Request is attached hereto and incorporated by reference as Attachment A.

In its February 22, 2013 denial letter, EPA claims that the Requesting States' fee waiver request must be denied because "you have not expressed a **specific intent** to disseminate the information to the general public." A copy of EPA's Fee Waiver Denial is attached hereto and incorporated by reference as Attachment B. Respectfully, EPA asserted basis for denial of the Requesting States' fee waiver request is wholly without merit. In their FOIA Request the Requesting States make numerous statements that the documents requested from EPA will be disseminated to the general public.

- "The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report...The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues." FOIA Request at p. 5.

- "The Requesting States plan to make [the EPA] documents available to the public at the University, Federal Depository and State Library systems [ ] in the respective Requesting States. As these facilities are open to the **general public**, many people will thereby have access to the information contained in the materials which are the subject of this request." (emphasis added). FOIA Request at p. 5.

Because the information sought in the FOIA Request is in the public interest, will significantly contribute to the public's understanding of the operations and activities of EPA and will not be used to further any commercial interest, the Requesting States properly sought a fee waiver pursuant to 40 C.F.R. § 2.107(*l*). *See also generally* 5 U.S.C. § 552(a)(4)(A)(iii).

As set forth below, EPA's denial of the Requesting States' fee waiver request is factually incorrect and legally contrary to FOIA, EPA's own regulations, and case law interpreting and applying fee waiver regulations. Accordingly, the Requesting States request the immediate reversal of EPA's denial of the fee waiver request and that EPA be instructed to proceed forthwith in processing the FOIA Request.

II. THE REQUESTING STATES ARE ENTITLED TO A FEE WAIVER FOR THE FOIA REQUEST

A. The Requesting States' Purpose And Intent For The Requested Information

Over the past three years EPA has allowed its regulatory and policy agenda to be largely defined by litigation settlements it has entered into with non-governmental organizations. On at least forty-five occasions, EPA and other federal agencies have settled lawsuits (which included the payment of plaintiffs' attorneys' fees) brought under the CAA and other environmental statutory programs. These settlements take the form of binding Consent Decrees that dictate how and when EPA and other federal agencies must develop stringent new regulations or whether to approve certain permit applications. Unfortunately, States responsible for implementing many of these regulations and permit programs have little knowledge of or input in the litigation or settlement process.

The effective exclusion of the States from these litigation or administrative proceedings is directly inconsistent with the cooperative federalism approach to implementing many of the environmental programs created under the CAA. In implementing these federal environmental programs, States often must design plans that meet the individual circumstances of the State, while protecting and advancing the environmental goals and requirements of federal environmental law. However, these State efforts and plans are effectively superseded when EPA enters into negotiated settlements with non-governmental organizations alone that dictate how federal environmental law should be applied and implemented in an individual State. When the States' important role as a partner with EPA in implementing federal environmental programs is ignored, the States and their important sovereign interests are impaired, as are the rights of their citizens who rely on and expect the States to implement the federal environmental laws—not EPA along with non-governmental organizations.

The Requesting States seek the Subject information so that they may: understand and make public EPA's decision-making process in negotiating and entering into litigation settlements; utilize the Subject information to inform the preparation and participation in the public comment process on negotiated settlements between EPA and non-governmental organizations; utilize the Subject information to determine the extent to which the cooperative federalism principles embodied in the environmental programs, such as the CAA, are being eroded by these negotiated settlements; and use the Subject information to inform and educate the general public, and State and federal lawmakers on the importance of cooperative federalism and why the States should continue to have the lead role in implementing federal environmental programs.

As fully explained in the FOIA Request, the Requesting States will analyze the information presented in the released documents and our staff of experts will produce a report as

part of our review of EPA's operations. The report **will be disseminated to the general public by being posted on State government websites as well as to the media and all members of Congress**. Further, the underlying Subject information and the report will be made available to the public at the University, Federal Depository and State Library systems (**"Library System"**) in the respective Requesting States. With the posting of the report on the States' websites and making the report available in the Library System, millions of people throughout the United States will have access to the Subject information and resulting report.

Additionally, most, if not all, of these Libraries also serve as a Federal Depository. Federal Depository Libraries were "established by Congress to ensure that the American public has access to its Government's information." http://www.gpo.gov/libraries/. As Federal Depositories, these libraries ensure that the agency publications and other information "are highly visible to the public, promoted, and safeguarded." *Id.* Moreover, making available the requested Subject information and report at University Libraries will facilitate the teaching and research occurring at these Universities on important public policy issues including cooperative federalism and the State federal partnership. None of the requested Subject information or the resulting report will be used for commercial use or gain.

B. Legal Standard for Fee Waivers

FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver test "should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver. *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1039 (D. Id. 2004). FOIA imposes a non-discretionary duty to provide documents without any charge if the disclosed information satisfies a two-prong test established by statute. *Fed. CURE v. Lappin*, 602 F.Supp. 2d 197, 202 (D.D.C. 2009) (documents "*shall* be furnished without any charge" if two-prong test is satisfied (emphasis and omission in original)). First, the disclosed information must be likely to significantly contribute to public understanding of governmental operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii). Second, the disclosed information cannot be primarily in the commercial interests of the requester. *Id.*

EPA has promulgated regulations detailing the specific factors it considers when evaluating the two-prong statutory test for fee waiver requests. 40 C.F.R. § 2.107(*l*)(2)-(3). EPA's regulations elucidate further that to be granted fee waiver requests it must be established that the information requested for disclosure must pertain to and significantly contribute to the public understanding of governmental operations and activities. As the FOIA Request demonstrates and this appeal further explains, the Requesting States have clearly met all of the statutory and regulatory requirements necessary to be granted a fee waiver.

1. First Factor: The FOIA Request is for Records Concerning EPA's Operations and Activities.

As detailed in the FOIA Request, the Subject information the Requesting States seek disclosure of directly concerns the operations and activities of EPA. 40 C.F.R. § 2.107(*l*)(2)(i). Specifically, the FOIA Request seeks information directly related to EPA's operations and activities related to its implementation and enforcement of the CAA's Regional Haze program through negotiated settlements with non-governmental organizations. These settlements directly imposed standards upon and/or required the State to take certain actions under the CAA.

In its enforcement of the CAA through settlements with non-governmental organizations, EPA is using public funds and resources. The Tenth Circuit held that a federal agency's expenditure of public funds and resources was an operation and activity of that agency satisfying the first factor of the public interest prong. *Forest Guardians*, 416 F.3d at 1178; *see also Edmonds Inst. v. DOI*, 460 F. Supp. 2d 63, 66-67 (D.D.C. 2006). Similarly, EPA has devoted public funds to paying attorneys' fees and devoted public resources to negotiating and enforcing the settlements. Clearly, the Requesting States meet the first factor as the requested Subject information concerns the "operations or activities of the government." 40 C.F.R. § 2.107(*l*)(2)(i).

2. Second Factor: The FOIA Request Seeks Meaningful Information That Contributes to an Increased Public Understanding about EPA's Operations or Activities Regarding the CAA and SIPs.

In considering whether to grant the Requesting States fee waiver request, EPA must determine whether the requested Subject information is meaningfully informative and likely to contribute to an increase in public understanding about those operations or activities. 40 C.F.R. § 2.107(*l*)(2)(ii). The Requesting States FOIA Request seeks information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest. How a federal agency interacts with non-governmental interests in the formation of policy has been identified as an "issue of the utmost importance." *NRDC v. United States EPA*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). And "an understanding of how [a federal agency] makes policy decisions, including the **influence of any outside groups on this process**, is also important to the public's understanding of the [government]. *Forest Guardians*, 416 F.3d at 1179-80. (emphasis added).

With the release of this meaningful information the Requesting States will use it to educate the public about how EPA has elected to resolve litigation and administrative actions which directly affect the formation of current and future federal environmental policy. In *Western Watersheds v. DOI*, the U.S. District Court determined the requesting party satisfied the second factor by requesting information that it would use to educate the public about an agency's decision-making and its intent to create a summary of such information that was reader-friendly. 318 F. Supp. 2d at 1040-41. The U.S. District Court for the District of Columbia reached the same result in *Federal CURE* in holding the requesting party's intent to analyze and synthesize

the requested information into a report relayed to the public via email and internet satisfied the second factor of the public interest prong. 602 F. Supp. 2d at 202-03. As explained in its FOIA Request, the Requesting States will prepare a report summarizing the Subject information which will be made available to the general public through the States' websites and the Library Systems of the Requesting States.

3.Third Factor: The FOIA Request Seeks Information That Contributes to the Understanding of a Broad Audience of Persons Interested in EPA's Operations or Activities Regarding the CAA and SIPs.

To satisfy the third factor, the requesting party must show that the requested information contributes to the understanding of a broad audience of persons interested in the subject. 40 C.F.R. § 2.107(*l*)(2)(iii). In *Forest Guardians*, the Court held that the requesting party satisfied the third factor by demonstrating its intent to broadly disseminate the compiled information, which was only available in piecemeal and hard-to-access form. *Forest Guardians*, 416 F.3d at 1181-82. As in *Forest Guardians*, the Requesting States seek piecemeal information that is held in a number of EPA's regional or other offices throughout the nation and which information cannot be easily accessed. The requested information relates to EPA's communications and documentation in a number of discrete administrative proceedings and lawsuits. *Id.* (holding information in court houses, newspaper articles, and affidavits not sufficient to justify denying a fee waiver). The Requesting States will then compile and summarize this information into an easily accessible and readable report for their citizens and distribute copies of the report to the general public, Congress and the media.

As detailed above, the Requesting States will disseminate the requested information to the general public by making the report as well as the underling information publicly available on the Requesting States' websites as well as through the Library Systems of each of the Requesting States. Because the report will be posted on State government websites any American with access to the internet will have access to the report. Accordingly, the report will be available to better inform **all** U.S. citizens on matters affecting EPA's operations and policy formation. *See Judicial Watch Inc. v. U.S. DOI*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000) (requesting party's concrete plan or specific intent for publication and other dissemination of requested information demonstrates compliance with third factor). Further, the Requesting States stature as representatives of their respective citizens and accountability to their citizens to provide information affecting each State's implementation of the CAA demonstrates that the Requesting States can and will disseminate the requested information to a broad group of interested persons. *See Fed. CURE*, 602 F. Supp. 2d at 204 (stature of largest public advocacy group demonstrated ability to disseminate information to reasonably broad group).

Finally, the Requesting States will use the report to educate State and federal lawmakers regarding the activities of EPA in negotiating settlements with non-governmental organizations that directly affect current and future federal environmental policy. The report will provide

invaluable information to these lawmakers as they consider future changes to environmental programs that will affect all Americans.

4. Fourth Factor: The FOIA Request Seeks Information That Will Significantly Enhance the Public's Understanding of EPA's Operations or Activities Regarding the CAA and SIPs.

The intention of FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," *NRDC* at 496 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The Requesting States are seeking the Subject information so as to significantly enhance the public's understanding of EPA's operations and activities and to ensure that the public has the information necessary to determine whether EPA's actions in entering into settlements with non-governmental organizations are prudent or thwart the cooperative federalism approach embodied in the CAA. 40 C.F.R. § 2.107(*l*)(2)(iv). Further, the public currently has no access to the requested Subject information. Only with disclosure of the requested Subject information will the public's understanding of EPA's operations and activities be greater than "as compared to the level of public understanding existing prior to the disclosure." 40 C.F.R. § 2.107(*l*)(2)(iv).

As detailed above, the Requesting States will prepare a report on EPA's decision-making process in negotiating and entering into certain litigation settlements and how these settlements are affecting current and future environmental policy. In taking the Subject information, which is not in the public domain, compiling it, and disseminating it to the public in easily accessible forums, the Requesting States meet the fourth factor. *Fed. CURE*, 602 F. Supp. 2d at 204-05. Clearly, the "public's understanding of EPA decision-making will be significantly enhanced by learning about the nature and scope of EPA communication[s]" and as such the Requesting States fee waiver request must be granted. *NRDC* at 501.

C. The Requesting States' FOIA Request Satisfies the Commercial-Interest Prong of the Fee Waiver Test.

In considering whether the second prong of the public interest fee waiver test is met, EPA considers the existence and magnitude of the requesting party's commercial interest in the requested information and whether the commercial interest outweighs the public interest. 40 C.F.R. § 2.107(*l*)(3). The Requesting States are exclusively comprised of State governments, which are noncommercial entities that have no commercial interest in the disclosure of information regarding the manner in which EPA operates. *See Fed. CURE*, 602 F. Supp. 2d at 201 (recognizing non-profit organization is a non-commercial entity entitled to fee waiver). The Requesting States' use of the requested Subject information is to make the information available—free of charge—to their respective citizens in a readable, summarized fashion. The States have no intention of using the information disclosed for financial gain. Nor does making the information available to the public create a commercial interest for the Requesting States. Further, the public interest in disclosure necessarily is greater in magnitude than that of the

Requesting States' complete lack of commercial interest in the requested information. 40 C.F.R. § 2.107(*l*)(3)(ii). The Requesting States have no commercial interest in the information requested and therefore satisfy the second prong of the fee waiver test.

III. CONCLUSION

The Requesting States are entitled to a fee waiver because the information sought will benefit the public's understanding as to how environmental laws are being manipulated to usurp the authority of States via Consent Decrees between EPA and non-governmental organizations—negotiations that leave the affected State or States entirely out of the process. The impact of these EPA settlements on current and future environmental policy is significant and impacts all Americans who are either directly or indirectly affected by EPA regulation and policy. Further, the Requesting States are making the Subject information available to the public and receive absolutely no financial benefit from the information. As such, the Requesting States respectfully request that EPA's fee waiver denial be reversed and that all fees related to responding to the FOIA Request be waived, and that EPA respond to the Requesting States' FOIA Request.

Sincerely,

P. Clayton Eubanks
Deputy Solicitor General

PCE:csn
Attachments

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

February 6, 2013

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

FREEDOM OF INFORMATION ACT REQUEST

Freedom of Information Officer
U.S. EPA, Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Hq.foia@epa.
FOIA REQUEST

Dear Sir or Madam:

This is a request under the Freedom of Information Act (5 U.S.C. § 552, as amended).

By this letter the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah and Wyoming (**"Requesting States"**) are requesting any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2009, to the date of this letter that discuss or in any way relates to:

(a) any consideration, proposal or discussions with any Interested Organization (as that term is defined below), or any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy (**"Other Organizations"**), concerning:

i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act (**"CAA"**), 42 U.S.C. § 7604(a)(2);

ATTACHMENT "A"

313 N.E. 21ST STREET • OKLAHOMA CITY, OK 73105 • (405) 521-3921 • FAX: (405) 521-6246

ii. the course of action to take with respect to any Regional Haze State Implementation Plan ("**SIP**") required to be submitted to the U.S. Environmental Protection Agency ("**EPA**") pursuant to CAA § 169A for any State;

iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP (the "**Subject**").

"**Interested Organizations**" is defined as any one of the following organizations:

- National Parks Conservation Association
- Montana Environmental Information Center
- Grand Canyon Trust
- Dine Citizens Against Ruining Our Environment
- Dakota Resource Council
- Dacotah Chapter of Sierra Club
- San Juan Citizens Alliance
- Our Children's Earth Foundation
- Plains Justice
- Powder River Basin Resource Council
- Sierra Club
- Environmental Defense Fund
- Wildearth Guardians
- Natural Resources Defense Council
- Western Resource Advocates
- Wyoming Outdoor Council
- Greater Yellowstone Coalition

(b) Copies of any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) sent or received by the following EPA offices:

i. the Office of the Administrator;
ii. the Office of Environmental Information;
iii. the Office of General Counsel;
iv. the Office of Inspector General;

v. the Office of International and Tribal Affairs;
vi. the Office of Research and Development;
vii. Region 1;
viii. Region 2;
ix. Region 3;
x. Region 4;
xi. Region 5;
xii. Region 6;
xiii. Region 7;
xiv. Region 8;
xv. Region 9; or
xvi. Region 10.

(including receipt by carbon copy or blind carbon copy), regarding the Subject including, but not limited to, documents sent by or received from individuals representing or employed by the Interested Organizations or Other Organizations.

Reason for FOIA Request

Over the past three years, the EPA has allowed its regulatory agenda to be largely defined by litigation settlements it has entered into with environmental organizations. Specifically, on at least forty-five occasions, EPA and other federal agencies have settled lawsuits (which included paying plaintiffs' attorneys' fees) brought under the CAA. These settlements take the form of binding Consent Decrees that dictate how and when EPA and other federal agencies must develop stringent new regulations. Unfortunately, States responsible for implementing many of these regulations have little knowledge of or input in this process, which is not consistent with the cooperative federalism structure of federal environmental law.

Out of the forty-five settlements that have been made public, EPA has paid almost $1 million in attorneys' fees to these groups, while also committing to develop a suite of sweeping new regulations. One EPA Consent Decree led to the promulgation of EPA's costliest regulation ever - the Mercury Air Toxics Standards (MATS). Other Consent Decrees include obligations that define how and when EPA acts on forty-five individual State Regional Haze SIPs – including the imposition of proposed federal implementation plans ("**FIPs**").

Many Consent Decrees authorize EPA to act in a way that is not consistent with current law. For example, Regional Haze Consent Decrees allowed EPA to propose combined Regional Haze SIPs/FIPs – something EPA has not done before in administering the CAA.

This is detrimental to the States and "unwinds" the State and federal partnership contained in the CAA.

States affected by these non-governmental organization lawsuits are not included as parties in the suits and when affected States try to intervene, EPA and the environmental groups frequently oppose State intervention. For instance, when the State of North Dakota sought to intervene in *Wildearth Guardians v. Jackson* in the U.S. District Court for the Northern District of California (where Wildearth Guardians filed its suit), EPA opposed the intervention despite the fact that the case involved how and when EPA should act on North Dakota's proposed Regional Haze SIP. *Wildearth Guardians v. Jackson*, No. C-09-2453-CW, 2011 U.S. Dist. LEXIS 14378 (N.D. Cal. Dec. 27, 2011) (order denying North Dakota's intervention).

State Attorneys General from the Requesting States are in the process of evaluating EPA's alarming practice of relying on Consent Decrees to deny the States their important role as a partner with EPA in implementing federal environmental law. Not only does EPA's action harm and jeopardize the States' role as a partner with EPA, but it harms the interests of the citizens of the Requesting States. Our citizens rely on and expect the States to implement federal environmental law. Often, these implementation efforts require the States to design plans to meet the individual circumstances of the State, while protecting and advancing the environmental goals and requirements of federal environmental law. When EPA coordinates with non-governmental organizations regarding how federal environmental law should be applied and implemented in an individual State and excludes the State from that effort the State and its citizens are harmed.

Rather than make individual FOIA requests, the Requesting States are making one request for the release of documents with the Interested Organizations and Other Organizations concerning the Subject. The Requesting States have lobbied, litigated, and publicly commented on federal actions which directly affect their individual State interests and those of their citizens. The requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States.

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA's operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

Fee Waiver Request

The Requesting States request that you waive any applicable fees since disclosure meets the standard for waiver of fees as it is in the public interest. *See* 40 C.F.R. § 2.107(l). Specifically, this request concerns "the operations or activities of the government;" disclosure is "likely to contribute" to an understanding of government operations or activities; disclosure will contribute to "public understanding;" the disclosure is likely to contribute "significantly" to public understanding of government operations and activities; and the States have no commercial interest in disclosure of the documents – the Requesting States' interest is to facilitate and promote the public interest. 40 C.F.R. § 2.107(2)(i),(iv).

Reasons for Granting the Fee Waiver Request

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA's operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

The Requesting States plan to make these documents available to the public at the University, Federal Depository and State Library systems ("**Library Systems**") in the respective Requesting States. As these facilities are open to the general public, many people will thereby have access to the information contained in the materials which are the subject of this request. Most, if not all, of these Libraries also serve as a Federal Depository. Federal Depository Libraries were "established by Congress to ensure that the American public has access to its Government's information." http://www.gpo.gov/libraries/. As Federal Depositories, these libraries ensure that the agency publications and other information "are highly visible to the public, promoted, and safeguarded." *Id.* Moreover, making available the requested Subject information and report at University Libraries will facilitate the teaching and research occurring at these Universities on important public policy issues including cooperative federalism and the State federal partnership. None of the requested Subject information or the resulting report will be used for commercial use or gain.

A. Legal Standard for Fee Waivers

FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver test "should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver. *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1039 (D. Id. 2004). FOIA imposes a non-discretionary duty to provide documents without any charge if the disclosed information

satisfies a two-prong test established by statute. *Fed. CURE v. Lappin*, 602 F.Supp. 2d 197, 202 (D.D.C. 2009) (documents "*shall* be furnished without any charge" if two-prong test is satisfied (emphasis and omission in original)). First, the disclosed information must be likely to significantly contribute to public understanding of governmental operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii). Second, the disclosed information cannot be primarily in the commercial interests of the requester. *Id.*

EPA has promulgated regulations detailing the specific factors it considers when evaluating the two-prong statutory test for fee waiver requests. 40 C.F.R. § 2.107(*l*)(2)-(3). EPA's regulations elucidate further that to be granted fee waiver requests a requester must establish that the information requested for disclosure must pertain to and significantly contribute to the public understanding of governmental operations and activities. As this FOIA Request demonstrates, the Requesting States have clearly met all of the statutory and regulatory requirements necessary to be granted a fee waiver.

1. First Factor: The FOIA Request is for Records Concerning EPA's Operations and Activities.

The Subject information the Requesting States seek directly concerns the operations and activities of EPA. 40 C.F.R. § 2.107(*l*)(2)(i). Specifically, the FOIA Request seeks information directly related to EPA's operations and activities related to its implementation and enforcement of the CAA through negotiated settlements with non-governmental organizations. These settlements directly imposed standards upon and/or required the State to take certain actions under the federal environmental program at issue in the lawsuit or administrative action.

In its enforcement of these federal programs through settlements with non-governmental organizations, EPA is using public funds and resources. The Tenth Circuit held that a federal agency's expenditure of public funds and resources was an operation and activity of that agency satisfying the first factor of the public interest prong. *Forest Guardians*, 416 F.3d at 1178; *see also Edmonds Inst. v. DOI*, 460 F. Supp. 2d 63, 66-67 (D.D.C. 2006). Similarly, EPA has devoted public funds to paying attorneys' fees and devoted public resources to negotiating and enforcing the settlements. Clearly, the Requesting States meet the first factor as the requested Subject information concerns the "operations or activities of the government." 40 C.F.R. § 2.107(*l*)(2)(i).

2. Second Factor: The FOIA Request Seeks Meaningful Information That Contributes to an Increased Public Understanding about EPA's Operations or Activities Regarding the CAA and SIPs.

In considering whether to grant the Requesting States fee waiver request, EPA must determine whether the requested Subject information is meaningfully informative and likely to contribute to an increase in public understanding about those operations or activities. 40 C.F.R. § 2.107(*l*)(2)(ii). The Requesting States FOIA Request seeks information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest. How a federal agency interacts with non-governmental interests in the formation of policy has been identified as an "issue of the utmost importance." *NRDC v. United States EPA*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). And "an understanding of how [a federal agency] makes policy decisions, including the **influence of any outside groups on this process,** is also important to the public's understanding of the [government]. *Forest Guardians*, 416 F.3d at 1179-80. (emphasis added).

With the release of this meaningful information the Requesting States will use it to educate the public about how EPA has elected to resolve litigation and administrative actions which directly affect the formation of current and future federal environmental policy. In *Western Watersheds v. DOI,* the U.S. District Court determined the requesting party satisfied the second factor by requesting information that it would use to educate the public about an agency's decision-making and its intent to create a summary of such information that was reader-friendly. 318 F. Supp. 2d at 1040-41. The U.S. District Court for the District of Columbia reached the same result in *Federal CURE* in holding the requesting party's intent to analyze and synthesize the requested information into a report relayed to the public via email and internet satisfied the second factor of the public interest prong. 602 F. Supp. 2d at 202-03. As explained in this FOIA Request, the Requesting States will prepare a report summarizing the Subject information which will be made available to the general public through the States' websites and the Library Systems of the Requesting States.

3. Third Factor: The FOIA Request Seeks Information That Contributes to the Understanding of a Broad Audience of Persons Interested in EPA's Operations or Activities Regarding the CAA and SIPs.

To satisfy the third factor, the requesting party must show that the requested information contributes to the understanding of a broad audience of persons interested in the subject. 40 C.F.R. § 2.107(*l*)(2)(iii). In *Forest Guardians*, the Court held that the requesting party satisfied the third factor by demonstrating its intent to broadly disseminate the compiled information, which was only available in piecemeal and hard-to-access form. *Forest Guardians*, 416 F.3d at 1181-82. As in *Forest Guardians*, the Requesting States seek piecemeal information that is held in a number of EPA's regional or other offices throughout the nation and which information cannot be easily accessed. The requested information relates to EPA's communications and documentation in a large number of discrete lawsuits and enforcement actions. *Id.* (holding information in court houses,

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Finally, the Requesting States will use the report to educate State and federal lawmakers regarding the activities of EPA in negotiating settlements with non-governmental organizations that directly affect current and future federal environmental policy. The report will provide invaluable information to these lawmakers as they consider future changes to environmental programs that will affect all Americans.

4. Fourth Factor: The FOIA Request Seeks Information That will Significantly Enhance the Public's Understanding of EPA's Operations or Activities Regarding the CAA and SIPs.

The intention of FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," *NRDC* at 496 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The Requesting States are seeking the Subject information so as to significantly enhance the public's understanding of EPA's operations and activities and to ensure that the public has the information necessary to determine whether EPA's actions in entering into settlements with non-governmental organizations are prudent or thwart the cooperative federalism approach embodied in many of the federal environmental programs. 40 C.F.R. § 2.107(*l*)(2)(iv). Further, the public currently has no access to the requested Subject information. Only with disclosure of the requested Subject information will the public's understanding of EPA's operations and activities be greater than "as compared to

the level of public understanding existing prior to the disclosure." 40 C.F.R. § 2.107(*l*)(2)(iv).

As detailed above, the Requesting States intend to prepare a report on EPA's decision-making process in negotiating and entering into certain litigation settlements and how these settlements are affecting current and future environmental policy. In taking the Subject information, which is not in the public domain, compiling it, and disseminating it to the public in easily accessible forums, the Requesting States meet the fourth factor. *Fed. CURE*, 602 F. Supp. 2d at 204-05. Clearly, the "public's understanding of EPA decision making will be significantly enhanced by learning about the nature and scope of EPA communication[s]" and as such the Requesting States fee waiver request must be granted. *NRDC* at 501.

B. The Requesting States' FOIA Request Satisfies the Commercial-Interest Prong of the Fee Waiver Test.

In considering whether the second prong of the public interest fee waiver test is met, EPA considers the existence and magnitude of the requesting party's commercial interest in the requested information and whether the commercial interest outweighs the public interest. 40 C.F.R. § 2.107(*l*)(3). The Requesting States are exclusively comprised of State governments, which are noncommercial entities that have no commercial interest in the disclosure of information regarding the manner in which EPA operates. *See Fed. CURE*, 602 F. Supp. 2d at 201 (recognizing non-profit organization is a non-commercial entity entitled to fee waiver). The Requesting States' intended use of the requested Subject information is to make the information available—free of charge—to their respective citizens in a readable, summarized fashion. The States have no intention of using the information disclosed for financial gain. Nor does making the information available to the public create a commercial interest for the Requesting States. Further, the public interest in disclosure necessarily is greater in magnitude than that of the Requesting States' complete lack of commercial interest in the requested information. 40 C.F.R. § 2.107(*l*)(3)(ii). The Requesting States have no commercial interest in the information requested and therefore satisfy the second prong of the fee waiver test.

In light of the ongoing and contentious public policy controversy regarding EPA's coordination and planning its regulatory agenda with non-governmental organizations, the Requesting States note that time is of the essence in this matter. There is a great need for prompt disclosure so that the released information may more adequately inform public understanding and discussion of EPA's actions.

In the event that access to any of the requested records is denied, please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We therefore request that the Requesting States be provided with all

non-exempt portions which are reasonably segregable. We further request that you describe the deleted material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies in this instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination, and in formulating arguments in case an appeal is taken. The EPA's written justification might also help to avoid unnecessary litigation. We of course reserve the right to appeal the withholding or deletion of any information and expect that you will list the office and address were such an appeal can be sent.

If for some reason, the fee waiver request is denied, while reserving my right to appeal such a decision, the Requesting States are willing to pay $5.00 (five dollars) to cover costs of document search and duplication.

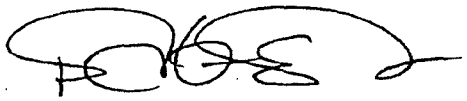
Access to the requested records should be granted within twenty (20) working days from the date of your receipt. Failure to respond in a timely manner shall be viewed as a denial of this request and the requesters may immediately file an administrative appeal.

Finally, the Requesting States ask that all correspondence regarding this FOIA request and all documents produced in response to this request be directed to the Attorney General of the State of Oklahoma.

Thanking you in advance for your prompt reply.

Sincerely,

E. Scott Pruitt
OKLAHOMA ATTORNEY GENERAL



P. Clayton Eubanks
DEPUTY SOLICITOR GENERAL
Office of Oklahoma Attorney General
(405) 522-8992 Fax (405) 522-0608
clayton.eubanks@oag.ok.gov

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Freedom Info Officer
US EPA Rec, FOIA
1200 Pennsylvania, NW
Washington, DC (2822T)
20460

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* | B. Date of Delivery

C. Signature

X 2/6/13 ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number
(Transfer from service label) 91 7199 9991 7032 0592 1186

PS Form 3811, March 2001 Domestic Return Receipt 102595-01-M-142

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

February 22, 2013

OFFICE OF
ENVIRONMENTAL INFORMATION

Mr. P. Clayton Eubanks
Deputy Solicitor General
Office of Oklahoma Attorney General
313 N. E. 21st Street
Oklahoma City, OK 73105

RE: Request Number EPA-HQ-2013-003886

Dear Mr. Eubanks:

This is in response to your request for a waiver of fees in connection with your Freedom of Information Act (FOIA) request to the U.S. Environmental Protection Agency (EPA) seeking a copy of records from the January 1, 2009 to February 6, 2013 regarding the scope and application of the non-discretionary duty to take certain action under the Clear Air Act; the course of action to take with respect to any Regional Haze State Implementation Plan; and other records as described in your request.

We have reviewed your fee waiver justification and based on the information provided, we are denying your request for a fee waiver. You have not expressed a specific intent to disseminate the information to the general public. As a result of you failing to meet the above criteria, accordingly, there is no need to address the remaining prongs of the fee waiver criteria. If the estimated cost exceeds $25.00 the Office of Air and Radiation will contact you regarding the cost of processing your request and seek an assurance of payment. They will be unable to process your request until they receive your written assurance of payment.

Under the FOIA, you have the right to appeal this determination to the National Freedom of Information Office, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, NW (2822T), Washington, DC 20460 (U.S. Postal Service Only), E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania

ATTACHMENT "B"

Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, NW, Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI number listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Should you choose to appeal this determination, please be sure to fully address all factors required by EPA's FOIA Regulations, located at 40 C.F.R. § 2.107(l) in your appeal. If you have any questions concerning this determination please contact me at (202) 566-1667.

Sincerely,

Larry F. Gottesman
National FOIA Officer

Subject: Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)

Dear Mr. Eubanks:

I am writing in regard to the above-referenced fee waiver appeal. My office is in receipt of your appeal file and is currently reviewing it for a response. We require a brief extension of time to complete the process of reviewing and finalizing the response. We expect to provide you with a determination on or before May 15, 2013. Thank you for your patience, and please contact me if you have any questions concerning your appeal.

Sincerely,

Lynn Kelly
Attorney-Advisor
U.S. Environmental Protection Agency
General Law Office
Office of General Counsel
(202) 564-3266
Office # 7426V

4

RE: Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)
Kelly, Lynn to: Clayton.Eubanks@oag.ok.gov 05/15/2013 03:10 PM

History: This message has been forwarded.

Mr. Eubanks:

I am writing with an update about the status of the above-referenced fee waiver appeal. My office is reviewing your appeal file, however we require one additional extension of time to complete the process of finalizing the response. We expect to provide you with a determination on or before May 31, 2013. Thank you again for your continued patience, and please contact me if you have any questions concerning your appeal.

Sincerely,

Lynn Kelly
Attorney-Advisor
U.S. Environmental Protection Agency
General Law Office
Office of General Counsel
(202) 564-3266
Office # 7426V

From: Clayton.Eubanks@oag.ok.gov [mailto:Clayton.Eubanks@oag.ok.gov]
Sent: Thursday, May 02, 2013 11:23 AM
To: Kelly, Lynn
Subject: Re: Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)

Thank you.

P. Clayton Eubanks
Deputy Solicitor General
Office of the Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105
Tel: (405) 522-8992
Fax:(405) 522-0085
clayton.eubanks@oag.ok.gov

From: "Kelly, Lynn" <Kelly.Lynn@epa.gov>
To: "clayton.eubanks@oag.ok.gov" <clayton.eubanks@oag.ok.gov>,
Date: 05/02/2013 10:20 AM

5

Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)
Kelly, Lynn to: clayton.eubanks@oag.ok.gov 05/02/2013 10:20 AM

History: This message has been replied to and forwarded.

Dear Mr. Eubanks:

I am writing in regard to the above-referenced fee waiver appeal. My office is in receipt of your appeal file and is currently reviewing it for a response. We require a brief extension of time to complete the process of reviewing and finalizing the response. We expect to provide you with a determination on or before May 15, 2013. Thank you for your patience, and please contact me if you have any questions concerning your appeal.

Sincerely,

Lynn Kelly
Attorney-Advisor
U.S. Environmental Protection Agency
General Law Office
Office of General Counsel
(202) 564-3266
Office # 7426V

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 3 1 2013

OFFICE OF
GENERAL COUNSEL

Mr. P. Clayton Eubanks
Deputy Solicitor General
Office of Oklahoma Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105

Re: Freedom of Information Act Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)

Dear Mr. Eubanks:

I am responding to your March 15, 2013 fee waiver appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. You appealed the February 22, 2013 decision of Larry Gottesman of the U.S. Environmental Protection Agency ("EPA" or "Agency") to deny your request for a fee waiver ("initial fee waiver denial"). You seek a waiver of all fees associated with your FOIA request for documents related to consideration, proposal, or discussion of three subjects related to the Clean Air Act ("CAA") with non-governmental organizations whose purpose may include environmental or natural resource advocacy and policy. You requested a waiver of all fees associated with processing your request, and stated you were willing to pay $5.00 (five dollars) in the event your fee waiver was denied.

On February 22, 2013, Mr. Gottesman, the EPA's National FOIA Officer, denied your request for a fee waiver finding that you had failed to express specific intent to disseminate the information to the general public, thus failing to demonstrate that your request is likely to contribute to public understanding of a reasonably broad audience of persons interested in the subject matter.

I have carefully considered your request for a fee waiver, EPA's initial fee waiver denial, and your appeal. For the reasons set forth below, I have concluded that you do not have a proper request pending before the Agency, and therefore your appeal of the denial of a waiver of fees is moot.

Analysis

In reviewing your February 6, 2013 FOIA request in order to process your fee waiver appeal, this office has determined that your initial request fails to adequately describe the records sought, as required by the FOIA and by EPA's regulations. 5 U.S.C. § 552(a)(3); 40 C.F.R. § 2.102(c). You seek records "which discuss or in any way relate to" any "consideration, proposal,

or discussion with" "Interested Organizations" or any "Other Organizations" on three broad topics related to the Clean Air Act. Request at 1. At least one category of your request (records described in paragraph (a)(i)) is almost identical to a request that was previously denied by EPA as improper on September 14, 2012. While you have tailored the subject matter of the next two categories of records you are seeking ((a)(ii) and (a)(iii)) by focusing only on Regional Haze State Implementation Plans ("SIPs"), you have not provided enough information to permit an employee reasonably familiar with the subject matter to identify the records you are seeking. This is because despite reducing the provided list of "Interested Organizations" from eighty to seventeen, you are still requesting documents related to any communication between EPA and "Other Organizations" which you broadly define as "any other non-governmental organization, including citizen organizations whose purpose or interest may include environmental or natural resource advocacy and policy." Request at 1. This qualifying statement about requesting records from "Other Organizations" effectively re-incorporates the sixty-three excluded organization from the list in your original request, as well as numerous other unnamed organizations, and would require EPA staff to also search for and determine the organizational mission of any 3rd party that may have had a communication with the Agency on topics under the CAA. Broad, sweeping requests lacking specificity are not sufficient. American Fed. of Gov't Employees v. Dep't of Commerce, 632 F.Supp. 1272, 1277 (D.D.C.1986). Additionally, requests for documents which "refer or relate to" a subject are routinely "subject to criticism as overbroad since life, like law, is 'a seamless web,' and all documents 'relate' to all others in some remote fashion." Massachusetts v. Dep't of Health & Human Servs., 727 F.Supp. 35, 36 n.2 (D.Mass 1989).

Additionally, paragraph (b) of your request is nearly identical to the request previously denied by EPA as an improper request on September 14, 2012. Instead of requesting "all documents" that in any way relate to the three broad categories of your request from every single headquarters and regional EPA office, you have requested records from sixteen different offices instead of twenty-one. Request at 2-3. You are requesting all documents sent or received by staff in sixteen EPA offices on three general subjects, for a period of almost four and a half years. Such "all documents" requests have been found by courts to be improper. *See*, Dale v. IRS, 238 F.Supp 2d 99, 104 (D.D.C. 2002); Mason v. Callaway, 554 F.2d 129, 131 (4th Cir.1977). By way of comparison, a recent District of Columbia decision found that a similar request that amounted to a request for all internal emails of 25 individuals over a two year period failed to reasonably describe the records sought, and was unreasonably burdensome. Hainey v. U.S. Dep't of Interior, No. 11-1725 (2013 WL 659090 (D.D.C.)). The court found that the burden of amassing this volume of information, in addition to the time needed to review the records, conflicted with settled case law that "an agency need not honor a [FOIA] request that requires 'an unreasonably burdensome search'" and that "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors." Id. At *8-9 (internal citations omitted).

For the reasons stated above, I have determined that your request does not reasonably identify the records you are seeking. Because this is your second attempt at submitting a properly formulated request, I will take this opportunity to indicate how your request might be modified to reasonably identify the records you are seeking. In order to reasonably identify the records you are seeking, you should identify the records with particular specificity. EPA regulations state that "whenever possible you should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter" and also that "[t]he more specific you are about the records or type of records you want, the more likely EPA will be able to identify and locate records responsive to your request." 40 C.F.R. § 2.103(c). Often this is accomplished by providing key words which employees may use to easily search for and determine if there are responsive records. For example, should you limit your request to records communicating with any *specifically identified* organization AND referencing settlement relating to the three subject areas you identify, your request would enable EPA staff familiar with the subject area to search for and locate any responsive records.

Because I have determined that you do not have a proper request pending before the Agency, your appeal of EPA's initial denial of a fee waiver for your request is moot, and I am closing your appeal file. Although I need not address the merits of your fee waiver request and appeal at this time, I have included the following discussion in order to assist you in submitting any properly formulated request for records and a waiver of fees.

Fee Waiver Discussion

The statutory standard for evaluating fee waiver requests is whether "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government; and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

EPA's regulations at 40 C.F.R. § 2.107(l)(2) and (3) establish the same standard. EPA must consider four conditions to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns the operations or activities of the Federal government; (2) whether the disclosure is likely to contribute to an understanding of government operations or activities; (3) whether the disclosure is likely to contribute to public understanding of a reasonably broad audience of persons interested in the subject matter; and (4) whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2). EPA must consider two conditions to determine whether a request is primarily in the commercial interest of the requester: (1) whether the requester has a commercial interest that would be furthered by the requested documents; and (2) whether any such commercial interest outweighs the public interest in disclosure. 40 C.F.R. § 2.107(l)(3).

Finally, the Agency considers fee waiver requests on a case-by-case basis. Judicial Watch, Inc. v. DOJ, 185 F. Supp. 2d 54, 60 (D.D.C. 2002). Whether a requester may have

received a fee waiver in the past is not relevant for a subsequent request.

Public Interest Prong of the Fee Waiver Test

A requester seeking a fee waiver bears the burden of showing that the disclosure of the responsive documents is in the public interest and is not primarily in the requester's commercial interest. See Judicial Watch, Inc., 185 F. Supp. 2d at 60; Larson v. CIA, 843 F. 2d 1481, 1483 (D.C. Cir. 1988). Conclusory statements or mere allegations that the disclosure of the requested documents will serve the public interest are not sufficient to meet the burden. See McClellan Ecological Seepage Situation, 835 F.2d at 1285; Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1312 (D.C. Cir. 2003). The requester must therefore explain with reasonable specificity how disclosure of the requested information is in the public interest by demonstrating how such disclosure is likely to contribute significantly to public understanding of government operations or activities. Larson, 843 F.2d at 1483. Furthermore, if the circumstances surrounding this request (e.g., the content of the request, the type of requester, the purpose for which the request is made, the requester's ability to disseminate the information to the public) clarify the point of the request, the requester must set forth these circumstances. See Larson, 843 F.2d at 1483.

Elements 2 and 4

I will discuss the second and fourth factors of the public interest prong at the same time. The second factor to consider is the informative value of the documents to be disclosed. 40 C.F.R. § 2.107(l)(2)(ii). The requested documents must be "meaningfully informative about government operations or activities in order to be 'likely to contribute' to an increased public understanding of those operations or activities." 40 C.F.R. § 2.107(l)(2)(ii). The disclosure of information already in the public domain would have no informative value since it would not add to the public's understanding of government. Id. The fourth factor to consider is how the disclosure of the requested records is likely to contribute "significantly" to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2)(iv). Disclosure of the information should significantly enhance the public's understanding of the subject in question as compared to the level of public understanding prior to disclosure. Id.

In support of your request, you generally state that "[t]he requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States." Request at 4. You also state that "disclosure 'is likely to contribute' to an understanding of government operations or activities'" and "disclosure is likely to contribute 'significantly' to public understanding of government operations and activities" (repeating the regulatory

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 3 1 2013

OFFICE OF
GENERAL COUNSEL

Mr. P. Clayton Eubanks
Deputy Solicitor General
Office of Oklahoma Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105

Re: Freedom of Information Act Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)

Dear Mr. Eubanks:

I am responding to your March 15, 2013 fee waiver appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. You appealed the February 22, 2013 decision of Larry Gottesman of the U.S. Environmental Protection Agency ("EPA" or "Agency") to deny your request for a fee waiver ("initial fee waiver denial"). You seek a waiver of all fees associated with your FOIA request for documents related to consideration, proposal, or discussion of three subjects related to the Clean Air Act ("CAA") with non-governmental organizations whose purpose may include environmental or natural resource advocacy and policy. You requested a waiver of all fees associated with processing your request, and stated you were willing to pay $5.00 (five dollars) in the event your fee waiver was denied.

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I have carefully considered your request for a fee waiver, EPA's initial fee waiver denial, and your appeal. For the reasons set forth below, I have concluded that you do not have a proper request pending before the Agency, and therefore your appeal of the denial of a waiver of fees is moot.

Analysis

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or discussion with" "Interested Organizations" or any "Other Organizations" on three broad topics related to the Clean Air Act. Request at 1. At least one category of your request (records described in paragraph (a)(i)) is almost identical to a request that was previously denied by EPA as improper on September 14, 2012. While you have tailored the subject matter of the next two categories of records you are seeking ((a)(ii) and (a)(iii)) by focusing only on Regional Haze State Implementation Plans ("SIPs"), you have not provided enough information to permit an employee reasonably familiar with the subject matter to identify the records you are seeking. This is because despite reducing the provided list of "Interested Organizations" from eighty to seventeen, you are still requesting documents related to any communication between EPA and "Other Organizations" which you broadly define as "any other non-governmental organization, including citizen organizations whose purpose or interest may include environmental or natural resource advocacy and policy." Request at 1. This qualifying statement about requesting records from "Other Organizations" effectively re-incorporates the sixty-three excluded organization from the list in your original request, as well as numerous other unnamed organizations, and would require EPA staff to also search for and determine the organizational mission of any 3rd party that may have had a communication with the Agency on topics under the CAA. Broad, sweeping requests lacking specificity are not sufficient. American Fed. of Gov't Employees v. Dep't of Commerce, 632 F.Supp. 1272, 1277 (D.D.C.1986). Additionally, requests for documents which "refer or relate to" a subject are routinely "subject to criticism as overbroad since life, like law, is 'a seamless web,' and all documents 'relate' to all others in some remote fashion." Massachusetts v. Dep't of Health & Human Servs., 727 F.Supp. 35, 36 n.2 (D.Mass 1989).

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A requester seeking a fee waiver bears the burden of showing that the disclosure of the responsive documents is in the public interest and is not primarily in the requester's commercial interest. See Judicial Watch, Inc., 185 F. Supp. 2d at 60; Larson v. CIA, 843 F. 2d 1481, 1483 (D.C. Cir. 1988). Conclusory statements or mere allegations that the disclosure of the requested documents will serve the public interest are not sufficient to meet the burden. See McClellan Ecological Seepage Situation, 835 F.2d at 1285; Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1312 (D.C. Cir. 2003). The requester must therefore explain with reasonable specificity how disclosure of the requested information is in the public interest by demonstrating how such disclosure is likely to contribute significantly to public understanding of government operations or activities. Larson, 843 F.2d at 1483. Furthermore, if the circumstances surrounding this request (e.g., the content of the request, the type of requester, the purpose for which the request is made, the requester's ability to disseminate the information to the public) clarify the point of the request, the requester must set forth these circumstances. See Larson, 843 F.2d at 1483.

Elements 2 and 4

I will discuss the second and fourth factors of the public interest prong at the same time. The second factor to consider is the informative value of the documents to be disclosed. 40 C.F.R. § 2.107(l)(2)(ii). The requested documents must be "meaningfully informative about government operations or activities in order to be 'likely to contribute' to an increased public understanding of those operations or activities." 40 C.F.R. § 2.107(l)(2)(ii). The disclosure of information already in the public domain would have no informative value since it would not add to the public's understanding of government. Id. The fourth factor to consider is how the disclosure of the requested records is likely to contribute "significantly" to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2)(iv). Disclosure of the information should significantly enhance the public's understanding of the subject in question as compared to the level of public understanding prior to disclosure. Id.

In support of your request, you generally state that "[t]he requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States." Request at 4. You also state that "disclosure 'is likely to contribute' to an understanding of government operations or activities'" and "disclosure is likely to contribute 'significantly' to public understanding of government operations and activities" (repeating the regulatory

standard). Request at 5. These general statements are typically insufficient to support a waiver of fees . Judicial Watch Inc. v. DOJ, 185 F.Supp 2d 54, 61-62 (D.D.C. 2002). You also state that "the public currently has no access to the requested Subject information," however information about the Clean Air Act, Regional Haze, and the public comment process around negotiated settlements is available on the Agency's program website[1] as well as on the websites of the Regional Planning Organizations' and States' sites. Request at 8; Appeal at 7.

Your less generalized statements in support of factors two and four also fail to demonstrate that your request satisfies the standard established by these elements. You state that your request seeks "information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest," that will help "understand and make public EPA's decision-making process in negotiating and entering into litigation settlements," and will educate the public on "the importance of cooperative federalism and why the States should continue to have the lead role in implementing federal environmental programs." Request at 7; Appeal at 3. As compared to the broad categories of your request, there is no clear nexus between the records requested and the areas of education identified above. For example, your request is in no way limited to communications with non-governmental organizations, or to discussions about cooperative federalism. Numerous records you have requested will not shed any light on these subjects, and you have not explained how all of the requested records will meaningfully inform the public about these stated topics.

Element 3

Additionally, the requester seeking a fee waiver must also demonstrate that the disclosure of the requested documents will likely contribute to the public understanding, *i.e.*, the understanding of "a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." 40 C.F.R. § 107(l)(2)(iii). The requester's expertise in the subject area and his or her "ability and intention to effectively convey information to the public will be considered." Id. A requester must express a specific intent to publish or disseminate the requested information, and identify a specific increase in public understanding that would result from such dissemination. Judicial Watch, Inc.v. DOJ, 122 F. Supp. 2d 5, 10 (D.D.C. 2000). A requester who does not provide specific information regarding a method of disseminating requested information will not meet the third factor, even if the requester has the ability to disseminate information. Judicial Watch, Inc. V. DOJ, 122 F. Supp. 2d 13, 18-19 (D.D.C. 2000).

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[1]*See, e.g.* http://www.epa.gov/airquality/visibility/program.html; http://www.epa.gov/airquality/visibility/actions.html.

You state that the "Requesting States" will compile and summarize the requested records into a report that will be distributed to the general public, the media, and Congress. Appeal at 6. You also state that the report will be available state libraries and web sites. Id. These general statements do not provide enough information to demonstrate a tangible or cognizable plan to disseminate the information. See, Van Fripp v. Parks, 2000 U.S. Dist. LEXIS 20158, *20 (D.D.C. Mar. 16, 2000) ("Obtaining placement in a library is, at best, a passive method of distribution that does not discharge the plaintiff's affirmative burden to disseminate information."). While it is possible that a report written using information obtained from the Agency could be informative, these general statements about passive methods of distribution, especially when unaccompanied by details about the authorship of a report by the staff of thirteen different state governments or about the intended audience, fails to demonstrate a specific intent to publish or disseminate the requested information.

This discussion above is being provided to you in order to assist you in understanding the Agency's obligations to evaluate fee waiver requests using the standards contained in EPA's regulations and the FOIA. Should you choose to submit a new request, please feel free to contact the Agency's FOIA Office for information about what you may provide in order to submit a proper request, and to provide the information necessary for the Agency to evaluate a request for a fee waiver.

Conclusion

This letter constitutes EPA's final determination on this matter. Pursuant to 5 U.S.C. 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have your principal place of business, or the district in which the records are situated, or in the District of Columbia. As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 301-837-1996 or 1-877-684-6448; and facsimile, 301-837-0348.

Please call Lynn Kelly at 202-564-3266 if you have any questions regarding this determination.

Sincerely,

Kevin M. Miller
Assistant General Counsel
General Law Office

cc: HQ FOI Office

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 31 2013

OFFICE OF
GENERAL COUNSEL

Mr. P. Clayton Eubanks
Deputy Solicitor General
Office of Oklahoma Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105

Re: Freedom of Information Act Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)

Dear Mr. Eubanks:

I am responding to your March 15, 2013 fee waiver appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. You appealed the February 22, 2013 decision of Larry Gottesman of the U.S. Environmental Protection Agency ("EPA" or "Agency") to deny your request for a fee waiver ("initial fee waiver denial"). You seek a waiver of all fees associated with your FOIA request for documents related to consideration, proposal, or discussion of three subjects related to the Clean Air Act ("CAA") with non-governmental organizations whose purpose may include environmental or natural resource advocacy and policy. You requested a waiver of all fees associated with processing your request, and stated you were willing to pay $5.00 (five dollars) in the event your fee waiver was denied.

On February 22, 2013, Mr. Gottesman, the EPA's National FOIA Officer, denied your request for a fee waiver finding that you had failed to express specific intent to disseminate the information to the general public, thus failing to demonstrate that your request is likely to contribute to public understanding of a reasonably broad audience of persons interested in the subject matter.

I have carefully considered your request for a fee waiver, EPA's initial fee waiver denial, and your appeal. For the reasons set forth below, I have concluded that you do not have a proper request pending before the Agency, and therefore your appeal of the denial of a waiver of fees is moot.

Analysis

In reviewing your February 6, 2013 FOIA request in order to process your fee waiver appeal, this office has determined that your initial request fails to adequately describe the records sought, as required by the FOIA and by EPA's regulations. 5 U.S.C. § 552(a)(3); 40 C.F.R. § 2.102(c). You seek records "which discuss or in any way relate to" any "consideration, proposal,

or discussion with" "Interested Organizations" or any "Other Organizations" on three broad topics related to the Clean Air Act. Request at 1. At least one category of your request (records described in paragraph (a)(i)) is almost identical to a request that was previously denied by EPA as improper on September 14, 2012. While you have tailored the subject matter of the next two categories of records you are seeking ((a)(ii) and (a)(iii)) by focusing only on Regional Haze State Implementation Plans ("SIPs"), you have not provided enough information to permit an employee reasonably familiar with the subject matter to identify the records you are seeking. This is because despite reducing the provided list of "Interested Organizations" from eighty to seventeen, you are still requesting documents related to any communication between EPA and "Other Organizations" which you broadly define as "any other non-governmental organization, including citizen organizations whose purpose or interest may include environmental or natural resource advocacy and policy." Request at 1. This qualifying statement about requesting records from "Other Organizations" effectively re-incorporates the sixty-three excluded organization from the list in your original request, as well as numerous other unnamed organizations, and would require EPA staff to also search for and determine the organizational mission of any 3rd party that may have had a communication with the Agency on topics under the CAA. Broad, sweeping requests lacking specificity are not sufficient. American Fed. of Gov't Employees v. Dep't of Commerce, 632 F.Supp. 1272, 1277 (D.D.C.1986). Additionally, requests for documents which "refer or relate to" a subject are routinely "subject to criticism as overbroad since life, like law, is 'a seamless web,' and all documents 'relate' to all others in some remote fashion." Massachusetts v. Dep't of Health & Human Servs., 727 F.Supp. 35, 36 n.2 (D.Mass 1989).

Additionally, paragraph (b) of your request is nearly identical to the request previously denied by EPA as an improper request on September 14, 2012. Instead of requesting "all documents" that in any way relate to the three broad categories of your request from every single headquarters and regional EPA office, you have requested records from sixteen different offices instead of twenty-one. Request at 2-3. You are requesting all documents sent or received by staff in sixteen EPA offices on three general subjects, for a period of almost four and a half years. Such "all documents" requests have been found by courts to be improper. *See*, Dale v. IRS, 238 F.Supp 2d 99, 104 (D.D.C. 2002); Mason v. Callaway, 554 F.2d 129, 131 (4th Cir.1977). By way of comparison, a recent District of Columbia decision found that a similar request that amounted to a request for all internal emails of 25 individuals over a two year period failed to reasonably describe the records sought, and was unreasonably burdensome. Hainey v. U.S. Dep't of Interior, No. 11-1725 (2013 WL 659090 (D.D.C.)). The court found that the burden of amassing this volume of information, in addition to the time needed to review the records, conflicted with settled case law that "an agency need not honor a [FOIA] request that requires 'an unreasonably burdensome search'" and that "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors." Id. At *8-9 (internal citations omitted).

For the reasons stated above, I have determined that your request does not reasonably identify the records you are seeking. Because this is your second attempt at submitting a properly formulated request, I will take this opportunity to indicate how your request might be modified to reasonably identify the records you are seeking. In order to reasonably identify the records you are seeking, you should identify the records with particular specificity. EPA regulations state that "whenever possible you should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter" and also that "[t]he more specific you are about the records or type of records you want, the more likely EPA will be able to identify and locate records responsive to your request." 40 C.F.R. § 2.103(c). Often this is accomplished by providing key words which employees may use to easily search for and determine if there are responsive records. For example, should you limit your request to records communicating with any *specifically identified* organization AND referencing settlement relating to the three subject areas you identify, your request would enable EPA staff familiar with the subject area to search for and locate any responsive records.

Because I have determined that you do not have a proper request pending before the Agency, your appeal of EPA's initial denial of a fee waiver for your request is moot, and I am closing your appeal file. Although I need not address the merits of your fee waiver request and appeal at this time, I have included the following discussion in order to assist you in submitting any properly formulated request for records and a waiver of fees.

Fee Waiver Discussion

The statutory standard for evaluating fee waiver requests is whether "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government; and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

EPA's regulations at 40 C.F.R. § 2.107(l)(2) and (3) establish the same standard. EPA must consider four conditions to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns the operations or activities of the Federal government; (2) whether the disclosure is likely to contribute to an understanding of government operations or activities; (3) whether the disclosure is likely to contribute to public understanding of a reasonably broad audience of persons interested in the subject matter; and (4) whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2). EPA must consider two conditions to determine whether a request is primarily in the commercial interest of the requester: (1) whether the requester has a commercial interest that would be furthered by the requested documents; and (2) whether any such commercial interest outweighs the public interest in disclosure. 40 C.F.R. § 2.107(l)(3).

Finally, the Agency considers fee waiver requests on a case-by-case basis. Judicial Watch, Inc. v. DOJ, 185 F. Supp. 2d 54, 60 (D.D.C. 2002). Whether a requester may have

received a fee waiver in the past is not relevant for a subsequent request.

Public Interest Prong of the Fee Waiver Test

A requester seeking a fee waiver bears the burden of showing that the disclosure of the responsive documents is in the public interest and is not primarily in the requester's commercial interest. See Judicial Watch, Inc., 185 F. Supp. 2d at 60; Larson v. CIA, 843 F. 2d 1481, 1483 (D.C. Cir. 1988). Conclusory statements or mere allegations that the disclosure of the requested documents will serve the public interest are not sufficient to meet the burden. See McClellan Ecological Seepage Situation, 835 F.2d at 1285; Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1312 (D.C. Cir. 2003). The requester must therefore explain with reasonable specificity how disclosure of the requested information is in the public interest by demonstrating how such disclosure is likely to contribute significantly to public understanding of government operations or activities. Larson, 843 F.2d at 1483. Furthermore, if the circumstances surrounding this request (e.g., the content of the request, the type of requester, the purpose for which the request is made, the requester's ability to disseminate the information to the public) clarify the point of the request, the requester must set forth these circumstances. See Larson, 843 F.2d at 1483.

Elements 2 and 4

I will discuss the second and fourth factors of the public interest prong at the same time. The second factor to consider is the informative value of the documents to be disclosed. 40 C.F.R. § 2.107(l)(2)(ii). The requested documents must be "meaningfully informative about government operations or activities in order to be 'likely to contribute' to an increased public understanding of those operations or activities." 40 C.F.R. § 2.107(l)(2)(ii). The disclosure of information already in the public domain would have no informative value since it would not add to the public's understanding of government. Id. The fourth factor to consider is how the disclosure of the requested records is likely to contribute "significantly" to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2)(iv). Disclosure of the information should significantly enhance the public's understanding of the subject in question as compared to the level of public understanding prior to disclosure. Id.

In support of your request, you generally state that "[t]he requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States." Request at 4. You also state that "disclosure 'is likely to contribute' to an understanding of government operations or activities'" and "disclosure is likely to contribute 'significantly' to public understanding of government operations and activities" (repeating the regulatory

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Your less generalized statements in support of factors two and four also fail to demonstrate that your request satisfies the standard established by these elements. You state that your request seeks "information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest," that will help "understand and make public EPA's decision-making process in negotiating and entering into litigation settlements," and will educate the public on "the importance of cooperative federalism and why the States should continue to have the lead role in implementing federal environmental programs." Request at 7; Appeal at 3. As compared to the broad categories of your request, there is no clear nexus between the records requested and the areas of education identified above. For example, your request is in no way limited to communications with non-governmental organizations, or to discussions about cooperative federalism. Numerous records you have requested will not shed any light on these subjects, and you have not explained how all of the requested records will meaningfully inform the public about these stated topics.

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Additionally, the requester seeking a fee waiver must also demonstrate that the disclosure of the requested documents will likely contribute to the public understanding, *i.e.*, the understanding of "a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." 40 C.F.R. § 107(l)(2)(iii). The requester's expertise in the subject area and his or her "ability and intention to effectively convey information to the public will be considered." Id. A requester must express a specific intent to publish or disseminate the requested information, and identify a specific increase in public understanding that would result from such dissemination. Judicial Watch, Inc.v. DOJ, 122 F. Supp. 2d 5, 10 (D.D.C. 2000). A requester who does not provide specific information regarding a method of disseminating requested information will not meet the third factor, even if the requester has the ability to disseminate information. Judicial Watch, Inc. V. DOJ, 122 F. Supp. 2d 13, 18-19 (D.D.C. 2000).

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[1] *See, e.g.* http://www.epa.gov/airquality/visibility/program.html; http://www.epa.gov/airquality/visibility/actions.html.

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Conclusion

This letter constitutes EPA's final determination on this matter. Pursuant to 5 U.S.C. 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have your principal place of business, or the district in which the records are situated, or in the District of Columbia. As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 301-837-1996 or 1-877-684-6448; and facsimile, 301-837-0348.

Please call Lynn Kelly at 202-564-3266 if you have any questions regarding this determination.

Sincerely,

Kevin M. Miller
Assistant General Counsel
General Law Office

cc: HQ FOI Office

STATE OF NEBRASKA
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2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
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JON BRUNING
ATTORNEY GENERAL

June 18, 2013

Via Certified Mail & Email

Acting Administrator Bob Perciasepe
Office of the Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460
perciasepe.bob@epa.gov

Re: New Source Performance Standards for Greenhouse Gases

Acting Administrator Perciasepe:

We are writing in response to the Notices of Intent to sue filed with the United States Environmental Protection Agency on April 15 and 17, 2013. These notices allege a failure by EPA to perform its non-discretionary duties of promulgating standards of performance for greenhouse gas emissions from new electric generating units (EGUs) and issuing emission guidelines for existing units.

The signatory parties to the notices indicate they "are willing to explore any effective means of resolving this matter without the need for litigation." As discussed below, there is no legal merit in the notices' Clean Air Act (CAA) § 304 allegations. Accordingly, the undersigned Attorneys General request that EPA decline to enter into any form of settlement negotiations to resolve the concerns of the petitioners. Air quality is of equal concern to all States. Appropriate process should not be subjugated, and effective policymaking cannot be forced to fruition, by threatening litigation.

In the event EPA deems it necessary and appropriate to allow the petitioners to commandeer the policymaking process under the threat of litigation, we request notice and an opportunity to participate in the resolution of the notices.

EPA Did Not Fail To Perform, or Unreasonably Delay, a Non-Discretionary Duty

The notices allege EPA failed to perform the non-discretionary duty of finalizing standards of performance for greenhouse gas emissions from new EGUs. That claim is incorrect.

Under CAA § 304, a district court may only compel "unreasonably delayed" action if that action is non-discretionary. The CAA makes clear that EPA must review the standards of performance for a listed source category at least every eight years, but is only required to revise such standards "if appropriate". CAA § 111(b). In 2006, EPA revised the standards of performance applicable to new EGUs. These revisions were challenged by petitioners in *New York v. EPA* (D.C. Cir. No. 06-1322). The revisions, which lacked performance standards for GHG emissions, were remanded to EPA in light of the Supreme Court's holding that various GHGs constitute "air pollutants" in *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

Following the *Massachusetts* decision, EPA conducted another review of the standard of performance for new EGUs and proposed standards for GHG emissions. 77 Fed. Reg. 22,392 (April 13, 2012). Although EPA has yet to finalize these standards, actual revision of the standards is discretionary under CAA § 111(b), and occurs only "if appropriate". Because the review has been conducted in a timely fashion and revisions are discretionary, suit is inappropriate under CAA § 304 for failure to perform a non-discretionary duty.

Likewise, because the issuance of emission guidelines is self-imposed by EPA regulation and not a non-discretionary duty under the CAA, § 304 is inapplicable to these claims. In any event, EPA's guideline publication regulations do not impose a specific timeframe for issuance of emissions guidelines. Indeed, they vest EPA with discretion to issue emission guidelines "upon or after promulgation of standards of performance." 40 C.F.R. § 60.22(a). Thus, were a duty to exist "under the CAA" it could not be deemed non-discretionary.

The CAA provides the States, rather than EPA, with responsibility for developing the standards of performance for existing sources under § 111(d). The only statutorily-imposed duty for EPA is to develop a process for States to submit plans for regulating existing sources; and this duty only arises when a standard of performance for new sources is found to be applicable. Accordingly, petitioners' § 304 allegations concerning EPA's failure to issue emission guidelines for existing sources also lack merit.

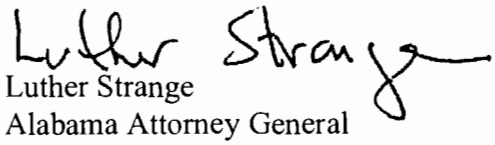
Conclusion

As the foregoing discussion establishes, EPA did not have a non-discretionary duty to take the actions petitioners' notices request. We therefore request that EPA refrain from allowing petitioners to unduly influence the policymaking process via settlement negotiations. However, if EPA feels compelled to engage in such negotiations, we request notice and an opportunity to be involved in the resolution of the notices.

Respectfully,

Jon Bruning
Nebraska Attorney General

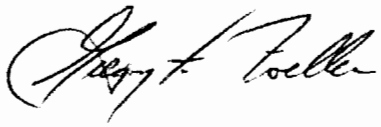
Jack Conway
Kentucky Attorney General



Luther Strange
Alabama Attorney General

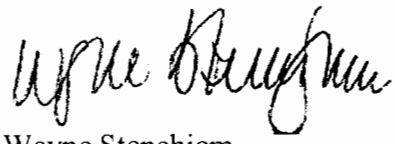
Tom Horne
Arizona Attorney General

Pamela Bondi
Florida Attorney General



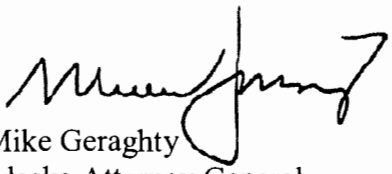
Greg Zoeller
Indiana Attorney General

Bill Schuette
Michigan Attorney General

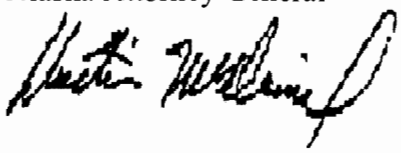


Wayne Stenehjem
North Dakota Attorney General

Scott Pruitt
Oklahoma Attorney General



Mike Geraghty
Alaska Attorney General

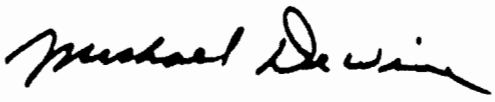


Dustin McDaniel
Arkansas Attorney General

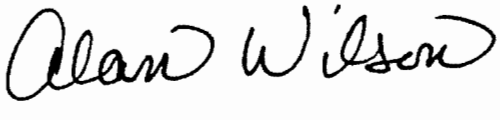
Sam Olens
Georgia Attorney General

Derek Schmidt
Kansas Attorney General

Tim Fox
Montana Attorney General



Mike DeWine
Ohio Attorney General



Alan Wilson
South Carolina Attorney General

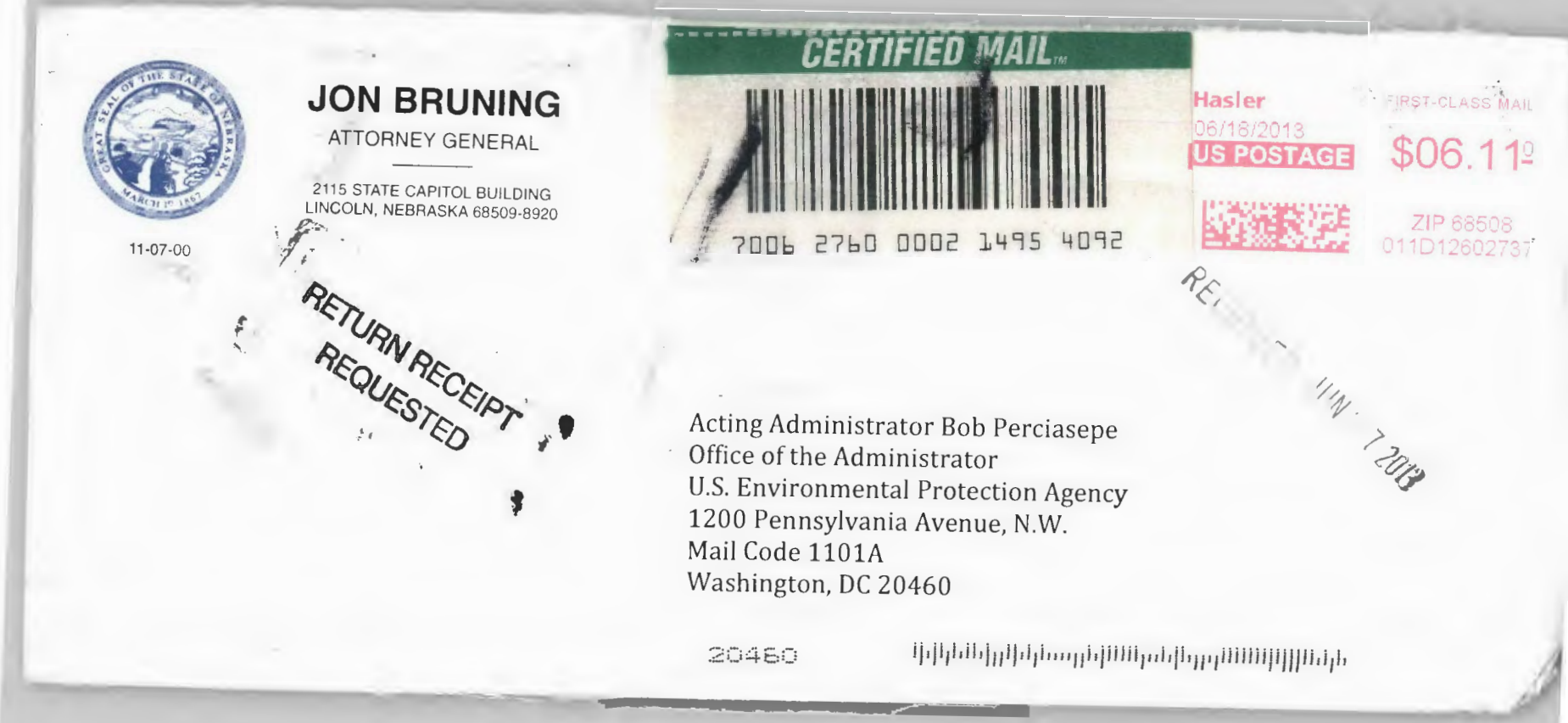
Marty J. Jackley
South Dakota Attorney General

Greg Abbott
Texas Attorney General

John E. Swallow
Utah Attorney General

Kenneth Cuccinelli
Virginia Attorney General

Patrick Morrisey
West Virginia Attorney General



JON BRUNING
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LINCOLN, NEBRASKA 68509-8920

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Acting Administrator Bob Perciasepe
Office of the Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460

20460

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

AUG 27 2013

OFFICE OF
GENERAL COUNSEL

Attorney General Jon Bruning
2115 State Capitol Building
Lincoln, Nebraska 68509

Attorney General Bruning:

I have been asked to respond to the June 18, 2013 letter from you and twenty other Attorneys General to Acting Administrator Perciasepe regarding Notices of Intent (NOI) to sue filed with the Environmental Protection Agency on April 15 and 17, 2013. These NOIs allege a failure by the EPA to perform non-discretionary duties to promulgate standards of performance for greenhouse gas emissions from new electric generating units (EGUs) and to issue emission guidelines for existing units.

Thank you for your views on the merits of the allegations stated in the NOIs. I have directed my staff to consider the points raised in your letter in formulating a response to any future deadline suits that may arise from these NOIs. At this time, no lawsuit has been filed based on these NOIs. EPA is always open to meeting with stakeholders on environmental issues, and should lawsuits be filed regarding this matter, EPA would be happy to arrange a meeting to consider your views on issues raised by the litigation.

I want to assure you that EPA agrees that settlements should not be used to resolve or constrain the final substantive decisions that the agency makes in any rulemaking. EPA does not and will not commit in a settlement agreement or consent decree to any final, substantive outcome in a rulemaking or other decision making process.

Again, thank you for your letter and views. If you have any questions or wish to discuss this further, please contact me or have your staff contact Scott Jordan at (202) 564-7508.

Sincerely,

Avi S. Garbow
General Counsel

AO440(Rev.12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Oklahoma

STATE OF OKLAHOMA, et al.

Plaintiff(s),

v.

ENVIRONMENTAL PROTECTION AGENCY,

Defendant(s).

Case No. CIV-13-726-M

RECEIVED
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OFFICE OF THE
EXECUTIVE SECRETARIAT

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

Bob Perciasepe, Acting Administrator
Environmental Protection Agency
Ariel Rios Building - 1200 Pennsylvania Avenue, NW
Washington, DC 20460

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) - or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12(a)(2) or (3) - you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

E. SCOTT PRUITT, OKLAHOMA ATTORNEY GENERAL
P. CLAYTON EUBANKS, DEPUTY SOLICITOR GENERAL
313 NE 21st STREET
OKLAHOMA CITY, OK 73105

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

SUMMONS ISSUED:

9:37 am, Jul 18, 2013

ROBERT D. DENNIS, Clerk

By: Nancy Rhea
Deputy Clerk

Signed and sealed by the Clerk of the Court or Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA *ex rel.* SCOTT PRUITT, in his official capacity as Attorney General of Oklahoma;	)	
STATE OF ALABAMA, by and through LUTHER STRANGE, in his official capacity as Attorney General of Alabama 501 Washington Avenue Montgomery, AL 36130;	)	Case No.
STATE OF ARIZONA, by and through TOM HORNE, in his official capacity as Attorney General of Arizona 1275 W. Washington Street Phoenix, AZ 85007;	)	
STATE OF GEORGIA, by and through SAMUEL S. OLENS, ATTORNEY GENERAL OF THE STATE OF GEORGIA 40 Capitol Square SW Atlanta, GA 30334;	)	
STATE OF KANSAS *ex rel.* DEREK SCHMIDT, in his official capacity as Attorney General of Kansas 120 SW 10th Avenue, 2nd Floor Topeka, KS 66612;	)	
STATE OF NEBRASKA, by and through JON C. BRUNING, ATTORNEY GENERAL OF THE STATE OF NEBRASKA 2115 State Capitol P.O. Box 98920 Lincoln, NE 68509;	)	
BILL SCHUETTE, ATTORNEY GENERAL OF THE STATE OF MICHIGAN,	)	

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA *ex rel.* SCOTT PRUITT, in his official capacity as Attorney General of Oklahoma;	)	
STATE OF ALABAMA, by and through LUTHER STRANGE, in his official capacity as Attorney General of Alabama 501 Washington Avenue Montgomery, AL 36130;	)	Case No.
STATE OF ARIZONA, by and through TOM HORNE, in his official capacity as Attorney General of Arizona 1275 W. Washington Street Phoenix, AZ 85007;	)	
STATE OF GEORGIA, by and through SAMUEL S. OLENS, ATTORNEY GENERAL OF THE STATE OF GEORGIA 40 Capitol Square SW Atlanta, GA 30334;	)	
STATE OF KANSAS *ex rel.* DEREK SCHMIDT, in his official capacity as Attorney General of Kansas 120 SW 10th Avenue, 2nd Floor Topeka, KS 66612;	)	
STATE OF NEBRASKA, by and through JON C. BRUNING, ATTORNEY GENERAL OF THE STATE OF NEBRASKA 2115 State Capitol P.O. Box 98920 Lincoln, NE 68509;	)	
BILL SCHUETTE, ATTORNEY GENERAL OF THE STATE OF MICHIGAN,	)	

ON BEHALF OF)
THE PEOPLE OF MICHIGAN;)
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through, WAYNE STENEHJEM, ATTORNEY)
GENERAL OF THE STATE OF)
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STATE OF SOUTH CAROLINA)
ex rel. ALAN WILSON, in his official)
capacity as Attorney General of South)
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)
STATE OF TEXAS, by and through)
GREG ABBOTT, ATTORNEY GENERAL)
OF THE STATE OF TEXAS)
300 W. 15th Street)
Austin, TX 78701;)
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STATE OF UTAH, by and through)
JOHN SWALLOW, ATTORNEY GENERAL)
OF UTAH)
Utah State Capitol Complex)
350 North State Street Suite 230)
SLC, UT 84114;)
)
STATE OF WYOMING)
123 Capitol Building)
200 W. 24th Street)
Cheyenne, WY 82002,)

Plaintiffs,	)
v.	)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)
Defendant.	)

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs, the States of Oklahoma, Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah and Wyoming, [1] bring this action against Defendant the United States Environmental Protection Agency ("EPA") to compel compliance with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.* As set forth below, under FOIA, the States sought records from EPA concerning the agency's implementation of a specific federal Clean Air Act ("CAA") program, 42 USC § 7401 *et seq.*. In violation of FOIA, EPA has denied the States' request. As grounds therefore, Plaintiffs allege as follows:

JURISDICTION AND VENUE

1. The Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. §

[1] At this time only the Attorney General of Oklahoma is admitted to practice before this Court. On behalf of the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah and Wyoming, the Attorney General of Oklahoma, pursuant to LCvR83.3(c), will be filing with the Court a Motion for Relief from LCvR83.2. Because the Attorney General of Oklahoma is the lead Plaintiff and will be filing all pleadings in this matter, the other State Attorneys General respectfully seek relief from the requirement that they each be required to be admitted pro hac vice.

552(a)(4)(A)(vii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706.

2. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

PARTIES

3. Plaintiffs are the State of Oklahoma with an address of 313 NE 21st Street, Oklahoma City, Oklahoma 73105; and the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah and Wyoming. Bill Schuette, Attorney General of Michigan, is bringing this action on behalf of the People of Michigan under Mich. Comp. Law § 14.28, which provides that the Michigan Attorney General may "appear for the people of [Michigan] in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of [Michigan] may be a party or interested." Under Michigan's constitution, the people are sovereign. Mich. Const. art. I, § 1 ("All political power is inherent in the people. Government is instituted for their equal benefit, security, and protection.").

4. Defendant is an agency of the United States Government and is headquartered in the Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington D.C. 20460. Defendant has possession, custody and control of records to which Plaintiffs seek access.

BACKGROUND

I. FOIA AND FEE WAIVER REQUESTS

5. FOIA requires agencies of the federal government to release requested records to the public unless one or more statutory exemptions apply. *See* 5 U.S.C. § 552(b).6.

6. When making a FOIA request, the requesting party must "reasonably describe such records" requested. 5 U.S.C. § 552(a)(3). EPA's FOIA regulations state that requesting parties:

> should reasonably describe the records [they] are seeking in a way that will permit EPA employees to identify and locate them. Whenever possible, [the requestor] should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, [the requestor] should include any file designations or descriptions for the records [requested]. The more specific [the requestor is] about the records or type of records [requested], the more likely EPA will be able to identify and locate records responsive to [the] request.

40 C.F.R. § 2.102

7. FOIA also mandates fee waiver or reduction when "disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii).

8. Congress intended that the assessment of fees not be a bar to private individuals or public interest groups seeking access to government records. Both FOIA and the legislative history of the relevant FOIA provision call for a liberal interpretation of the fee waiver standard. "Documents shall be furnished without any charge or at a charge

reduced below the fees established ... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). ("A requester is likely to contribute significantly to public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government." 132 Cong. Rec. H9464 (Reps. English and Kindness)).

9. FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI*, 416 F.3d 1173, 1178 (10th Cir. 2005).

10. A recent study found that EPA disproportionately denies fee waiver requests from noncommercial requesters who seek records so as to understand whether EPA is faithfully complying with applicable law. According to the Competitive Enterprise Institute's ("CEI") study, 92 percent of the time EPA grants fee waiver requests from noncommercial requesters who are supportive of EPA's policies and agendas, but denies a majority of fee waiver requests from noncommercial requesters who are critical of EPA. *See EPA Gives Info For Free to Big Green Groups 92% of Time; Denies 93% of Fee Waiver Requests from Biggest Conservative Critic,* Competitive Enterprise Institute, May 14, 2013, http://cei.org/news-releases/epa-gives-info-free-big-green-groups-92-time-denies-93-fee-waiver-requests-biggest-con.

II. THE CLEAN AIR ACT

11. The CAA establishes "a comprehensive national program that makes the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). At the same time, the CAA recognizes that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3); *see also id.* § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . ."). Under the CAA, one way that the control of air pollution is achieved is through the States implementation of national ambient air quality standards ("NAAQS") (CAA §110). The CAA directs EPA's Administrator to promulgate NAAQS and provides for the adoption of State Implementation Plans ("SIPs") to achieve and maintain those standards. The "primary" NAAQS prescribe maximum acceptable concentrations of various pollutants in the ambient air, which, "allowing an adequate margin of safety, are requisite to protect the public health." CAA § 109(b)(1). The statute provides that the primary NAAQS for each targeted pollutant be based on "air quality criteria" that "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health...which may be expected from the presence of such pollutant in the ambient air, in varying quantities." CAA § 108(a)(2).

12. EPA must review each NAAQS at least every five years. CAA § 109(d)(1). In conducting each such review, EPA must conduct notice-and-comment rulemaking

pursuant to CAA § 307(d). CAA § 307(d)(1)(A). The adoption of a new or revised NAAQS triggers a standard implementation process in which "[e]ach State shall have the primary responsibility for assuring air quality" within its boundaries "by submitting an implementation plan for such State which will specify the manner in which national primary . . . ambient air quality standards will be achieved and maintained . . . ." CAA § 107(a).

13. In contrast to the NAAQS, the CAA's Visibility Protection Program is a non-health based program built around the goal, set forth in Section 169A(a)(1) of the CAA, of the "prevent[ing] of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas, which impairment results from manmade air pollution." Recognizing that visibility impairment does not rise to the same level of public policy concern as dangers to public health, Congress made the visibility improvement goal discretionary. Thus, under Section 169A(f), for purposes of the citizens suit provision of the statute, the national visibility goal "shall not be considered to be a 'non-discretionary duty' of the Administrator."

14. In furtherance of the Section 169A visibility goal, the Visibility Protection Program directs States to develop Regional Haze SIPs to ensure "reasonable progress" is made toward the visibility goal, including satisfying certain requirements for identifying best available retrofit technology ("BART"). *See* 42 U.S.C. § 7491-7492. In 1999, EPA promulgated Regional Haze Rules that require all States to revise their federal CAA SIPs to address visibility in nearby national parks and wilderness areas known as Class I areas.

These rules were the subject of several federal court challenges. *See American Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002), *Center for Energy and Economic Development v. EPA*, 398 F.3d 653 (D.C. Cir. 2005), and *Utility Air Regulatory Group v. EPA*, 471 F.3d 1333, 1338 (D.C. Cir. 2006). In *American Corn Growers* the D.C. Circuit made clear that States have great discretion in setting reasonable progress goals and determining BART. The CAA's "provisions give [] the States broad authority over BART determinations." *American Corn Growers*, 291 F.3d 19.

15. Specifically, Section 169A of the CAA provides that the States shall have the dominant role in making a BART determination, with EPA having only a more limited role. Second, because visibility improvement is an aesthetic goal, the CAA does not make improving visibility conditions in Class I areas paramount above all other competing considerations. Instead, the States are given broad discretion to weigh public interest factors in determining (a) how much progress towards improving visibility they deem to be reasonable and (b) whether particular BART controls, or any BART controls at all, should be imposed on a particular source, based on a balancing of the cost of controls and the visibility improvement benefits that such controls will produce. EPA may not second-guess those State judgments so long as the States' determinations are consistent with Section 169A of the CAA and are reasonable and rationally supported by the State's administrative record reflecting the data and analysis used to come to those determinations.

16. In addition to making and submitting BART determinations to EPA, CAA § 169A(b)(2), requires EPA to issue regulations requiring States containing Class I areas, or States whose emissions may reasonably be anticipated to cause or contribute to visibility impairment in a Class I area, to submit SIPs containing "such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting" the national visibility goal. The amount of progress that is "reasonable" is not defined according to objective criteria, but instead involves a discretionary balancing by the State of public interest factors, specifically "the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements." CAA § 169A(g)(1).

17. Notably, CAA Section 169A is clear that it is the States, not EPA, that make both the reasonable progress and BART determination decisions. Section 169A(b)(2)(A) specifically provides that both the reasonable progress and the BART determinations are "determined by the State." Section 169A(g)(2) similarly provides that "in determining [BART], the State" shall weigh the BART factors.

III. STATEMENT OF FACTS

18. On February 6, 2013, the States of Oklahoma, Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah and Wyoming submitted a FOIA request to EPA for records concerning EPA's negotiations with certain

non-governmental organizations that have led to binding consent decrees that dictate when and how EPA must proceed concerning various States' Regional Haze SIPs. *See* Exhibit 1. The States' FOIA request explained that EPA's practice of settling litigation via consent decrees with certain non-governmental organizations is of great concern because such decrees then define EPA's regulatory approach to State Regional Haze SIPs without the States involvement, yet the States must bear the consequences of EPA's process and implement these regulatory changes. The States expressed concern that EPA's actions were not consistent with the cooperative federalism structure of the CAA or the Regional Haze program.

19. The February 6, 2013 FOIA request was submitted after EPA denied the States' previous FOIA request for records concerning EPA's practice of entering into consent decrees with non-governmental organizations in cases concerning the implementation of several environmental programs, not just the Regional Haze program. EPA denied the States' previous FOIA request asserting that the request was overbroad and that there was no demonstration that the records would be disseminated to the general public. At the time EPA denied the States' previous FOIA request, EPA advised Oklahoma Deputy Solicitor General Eubanks in a telephone conversation that the States should resubmit FOIA requests for records concerning individual environmental programs and specific cases and that EPA would review those requests.

20. The States' FOIA request makes clear the type, scope and location of the records sought from EPA. Specifically, the States' FOIA request asks for any and all documents sent and/or received by specific EPA offices, including the office of the Administrator, that discuss or in any way relates to:

(a) any consideration, proposal or discussions with any Interested Organization (as that term is defined below), or any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy, concerning:

i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the CAA, 42 U.S.C. § 7604(a)(2);

ii. the course of action to take with respect to any Regional Haze SIP required to be submitted to the EPA pursuant to CAA § 169A for any State;

iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP.

"Interested Organizations" is defined as any one of the following organizations:

-National Parks Conservation Association
-Montana Environmental Information Center
-Grand Canyon Trust
- Dine Citizens Against Ruining Our Environment
- Dakota Resource Council
- Dacotah Chapter of Sierra Club
- San Juan Citizens Alliance
-Our Children's Earth Foundation
-Plains Justice
-Powder River Basin Resource Council
-Sierra Club

-Environmental Defense Fund
-Wildearth Guardians
-Natural Resources Defense Council
-Western Resource Advocates

See Exhibit 1 at 1-3.

21. Clearly set forth in the States' FOIA request was a fee waiver request based on the fact that the States' request is in the public interest and therefore EPA must waive any applicable fees associated with fully responding to the request. *See* 40 C.F.R. § 2.107(l). The States' FOIA request clearly sets forth that the requested documents will be made available to the public at the University, Federal Depository and State Library systems located in each of the requesting States. *See* Exhibit 1 at 5. Additionally, the States will analyze the data presented in the requested records and will produce a report as part of their ongoing review of EPA's operations. *See id.* The report will be disseminated to others in the States as well as disseminated to the media and Congress as a component of the States' active involvement in "State efforts addressing environmental issues." *See id.* The States' FOIA request averred that none of the requested documents or the resulting report will be used for commercial use or gain. *See id.*

22. By letter dated February 22, 2013, EPA denied the States' fee waiver request, claiming that the States had "not expressed a specific intent to disseminate the information to the general public." *See* Exhibit 2 at 1.

23. On March 15, 2013 the States timely filed their appeal of EPA's denial of the States' fee waiver request. *See* Exhibit 3.

24. By email dated May 2, 2013, EPA stated that it required "a brief extension of time" until May 15, 2013 to complete its review and respond to Oklahoma's March 15 appeal. *See* Exhibit 4. On May 15, 2013, EPA sent the office of the Attorney General of Oklahoma an email informing Oklahoma that EPA required yet another extension of time until May 31, 2013 to complete its review and issue a determination of whether Oklahoma's fee waiver request should be granted. *See* Exhibit 5.

25. By letter dated May 31, 2013, EPA denied the States' FOIA request. *See* Exhibit 6. In its denial letter, EPA claims that the States' FOIA request "fails to adequately describe the records sought," and therefore the request was denied. Exhibit 6 at 1. EPA's denial of the States' FOIA request is consistent with their apparent protocol to avoid compliance with FOIA by telling requestors that their FOIA request is overbroad. In a recent email exchange disclosed by EPA as a result of a FOIA request, an EPA official advises a Region 6 EPA employee that "standard [EPA] protocol" is to tell all "requestor[s] that they need to narrow their [FOIA] request because it is overbroad." *See* Exhibit 7 at 6.

26. Further, because EPA denied the States' FOIA request, EPA refused to act on Oklahoma's appeal of EPA's denial of the States' FOIA fee waiver request asserting that the appeal was moot. *See* Exhibit 6 at 3.

27. The EPA's May 31, 2013 denial letter constitutes the agency's final determination. *See* Exhibit 6 at 6. Plaintiff has therefore exhausted all administrative

remedies with EPA and now files this action for judicial review of EPA's determinations, which is proper pursuant to 5 U.S.C. 552(a)(4)(B).

PLAINTIFFS' CLAIMS FOR RELIEF

COUNT ONE
(Failure to Produce Records)

28. Plaintiff States re-allege and incorporate by reference all preceding paragraphs.

29. Defendant is unlawfully withholding records requested by Plaintiff pursuant to 5 U.S.C. § 552.

30. Plaintiff States properly asked for specific records within the custody and control of EPA. The States' FOIA request was not overbroad. The States' FOIA request stated with specificity the type of records sought in such a way that would "permit EPA employees to identify and locate" the requested records. U.S.C. § 552(a)(3), 40 C.F.R. § 2.102.

31. EPA violated FOIA's mandate to release agency records to the public by failing to release the records as the States specifically requested. U.S.C. §§ 552(a)(3)(A), 552(a)(3)(B).

COUNT TWO
(Improper Denial of Fee Waiver Request)

32. Plaintiff States re-allege and incorporate by reference all preceding paragraphs.

33. Plaintiff States have demonstrated they are entitled to a waiver of fees associated with processing their FOIA request because the information sought in the FOIA

request is in the public interest, will significantly contribute to the public's understanding of the operations and activities of EPA and will not be used to further any commercial interest. 5 U.S.C. § 552(a)(4)(A)(iii), 40 C.F.R. § 2.107(l).

34. EPA violated FOIA and its own regulations when it failed to grant the States' fee waiver request. U.S.C. § 552(a)(4)(A)(ii)-(iii), 40 C.F.R. § 2.107(1)(2) and (3).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff States respectfully requests that this Court:

1. Order Defendant to immediately process the States' FOIA request;

2. Order Defendant to conduct a thorough search for all responsive records;

3. Order Defendant to promptly disclose the requested records in their entirety and make copies available to the Plaintiff States;

4. Enjoin Defendant from charging the Plaintiff States fees for the processing of their requests;

5. Award Plaintiff States their costs and reasonable attorneys' fees incurred in this action under U.S.C. § 552(a)(4)(E); and

6. Grant such other relief as the Court may deem just and proper.

Date: July 16, 2013.

Respectfully submitted,

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Counsel for Plaintiff the State of Wyoming

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

February 6, 2013

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

FREEDOM OF INFORMATION ACT REQUEST

Freedom of Information Officer
U.S. EPA, Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Hq.foia@epa.
FOIA REQUEST

Dear Sir or Madam:

This is a request under the Freedom of Information Act (5 U.S.C. § 552, as amended).

By this letter the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah and Wyoming ("**Requesting States**") are requesting any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2009, to the date of this letter that discuss or in any way relates to:

(a) any consideration, proposal or discussions with any Interested Organization (as that term is defined below), or any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy ("**Other Organizations**"), concerning:

i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act ("**CAA**"), 42 U.S.C. § 7604(a)(2);

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ii. the course of action to take with respect to any Regional Haze State Implementation Plan ("**SIP**") required to be submitted to the U.S. Environmental Protection Agency ("**EPA**") pursuant to CAA § 169A for any State;

iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP (the "**Subject**").

"**Interested Organizations**" is defined as any one of the following organizations:

- National Parks Conservation Association
- Montana Environmental Information Center
- Grand Canyon Trust
- Dine Citizens Against Ruining Our Environment
- Dakota Resource Council
- Dacotah Chapter of Sierra Club
- San Juan Citizens Alliance
- Our Children's Earth Foundation
- Plains Justice
- Powder River Basin Resource Council
- Sierra Club
- Environmental Defense Fund
- Wildearth Guardians
- Natural Resources Defense Council
- Western Resource Advocates
- Wyoming Outdoor Council
- Greater Yellowstone Coalition

(b) Copies of any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) sent or received by the following EPA offices:

i. the Office of the Administrator;
ii. the Office of Environmental Information;
iii. the Office of General Counsel;
iv. the Office of Inspector General;

v. the Office of International and Tribal Affairs;
vi. the Office of Research and Development;
vii. Region 1;
viii. Region 2;
ix. Region 3;
x. Region 4;
xi. Region 5;
xii. Region 6;
xiii. Region 7;
xiv. Region 8;
xv. Region 9; or
xvi. Region 10.

(including receipt by carbon copy or blind carbon copy), regarding the Subject including, but not limited to, documents sent by or received from individuals representing or employed by the Interested Organizations or Other Organizations.

Reason for FOIA Request

Over the past three years, the EPA has allowed its regulatory agenda to be largely defined by litigation settlements it has entered into with environmental organizations. Specifically, on at least forty-five occasions, EPA and other federal agencies have settled lawsuits (which included paying plaintiffs' attorneys' fees) brought under the CAA. These settlements take the form of binding Consent Decrees that dictate how and when EPA and other federal agencies must develop stringent new regulations. Unfortunately, States responsible for implementing many of these regulations have little knowledge of or input in this process, which is not consistent with the cooperative federalism structure of federal environmental law.

Out of the forty-five settlements that have been made public, EPA has paid almost $1 million in attorneys' fees to these groups, while also committing to develop a suite of sweeping new regulations. One EPA Consent Decree led to the promulgation of EPA's costliest regulation ever - the Mercury Air Toxics Standards (MATS). Other Consent Decrees include obligations that define how and when EPA acts on forty-five individual State Regional Haze SIPs – including the imposition of proposed federal implementation plans ("**FIPs**").

Many Consent Decrees authorize EPA to act in a way that is not consistent with current law. For example, Regional Haze Consent Decrees allowed EPA to propose combined Regional Haze SIPs/FIPs – something EPA has not done before in administering the CAA.

This is detrimental to the States and "unwinds" the State and federal partnership contained in the CAA.

States affected by these non-governmental organization lawsuits are not included as parties in the suits and when affected States try to intervene, EPA and the environmental groups frequently oppose State intervention. For instance, when the State of North Dakota sought to intervene in *Wildearth Guardians v. Jackson* in the U.S. District Court for the Northern District of California (where Wildearth Guardians filed its suit), EPA opposed the intervention despite the fact that the case involved how and when EPA should act on North Dakota's proposed Regional Haze SIP. *Wildearth Guardians v. Jackson*, No. C-09-2453-CW, 2011 U.S. Dist. LEXIS 14378 (N.D. Cal. Dec. 27, 2011) (order denying North Dakota's intervention).

State Attorneys General from the Requesting States are in the process of evaluating EPA's alarming practice of relying on Consent Decrees to deny the States their important role as a partner with EPA in implementing federal environmental law. Not only does EPA's action harm and jeopardize the States' role as a partner with EPA, but it harms the interests of the citizens of the Requesting States. Our citizens rely on and expect the States to implement federal environmental law. Often, these implementation efforts require the States to design plans to meet the individual circumstances of the State, while protecting and advancing the environmental goals and requirements of federal environmental law. When EPA coordinates with non-governmental organizations regarding how federal environmental law should be applied and implemented in an individual State and excludes the State from that effort the State and its citizens are harmed.

Rather than make individual FOIA requests, the Requesting States are making one request for the release of documents with the Interested Organizations and Other Organizations concerning the Subject. The Requesting States have lobbied, litigated, and publicly commented on federal actions which directly affect their individual State interests and those of their citizens. The requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States.

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA's operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

Fee Waiver Request

The Requesting States request that you waive any applicable fees since disclosure meets the standard for waiver of fees as it is in the public interest. *See* 40 C.F.R. § 2.107(l). Specifically, this request concerns "the operations or activities of the government;" disclosure is "likely to contribute" to an understanding of government operations or activities; disclosure will contribute to "public understanding;" the disclosure is likely to contribute "significantly" to public understanding of government operations and activities; and the States have no commercial interest in disclosure of the documents – the Requesting States' interest is to facilitate and promote the public interest. 40 C.F.R. § 2.107(2)(i),(iv).

Reasons for Granting the Fee Waiver Request

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA's operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

The Requesting States plan to make these documents available to the public at the University, Federal Depository and State Library systems ("**Library Systems**") in the respective Requesting States. As these facilities are open to the general public, many people will thereby have access to the information contained in the materials which are the subject of this request. Most, if not all, of these Libraries also serve as a Federal Depository. Federal Depository Libraries were "established by Congress to ensure that the American public has access to its Government's information." http://www.gpo.gov/libraries/. As Federal Depositories, these libraries ensure that the agency publications and other information "are highly visible to the public, promoted, and safeguarded." *Id.* Moreover, making available the requested Subject information and report at University Libraries will facilitate the teaching and research occurring at these Universities on important public policy issues including cooperative federalism and the State federal partnership. None of the requested Subject information or the resulting report will be used for commercial use or gain.

A. Legal Standard for Fee Waivers

FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI,* 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver test "should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver. *W. Watersheds Project v. Brown,* 318 F. Supp. 2d 1036, 1039 (D. Id. 2004). FOIA imposes a non-discretionary duty to provide documents without any charge if the disclosed information

satisfies a two-prong test established by statute. *Fed. CURE v. Lappin*, 602 F.Supp. 2d 197, 202 (D.D.C. 2009) (documents "*shall* be furnished without any charge" if two-prong test is satisfied (emphasis and omission in original)). First, the disclosed information must be likely to significantly contribute to public understanding of governmental operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii). Second, the disclosed information cannot be primarily in the commercial interests of the requester. *Id.*

EPA has promulgated regulations detailing the specific factors it considers when evaluating the two-prong statutory test for fee waiver requests. 40 C.F.R. § 2.107(*l*)(2)-(3). EPA's regulations elucidate further that to be granted fee waiver requests a requester must establish that the information requested for disclosure must pertain to and significantly contribute to the public understanding of governmental operations and activities. As this FOIA Request demonstrates, the Requesting States have clearly met all of the statutory and regulatory requirements necessary to be granted a fee waiver.

1. First Factor: The FOIA Request is for Records Concerning EPA's Operations and Activities.

The Subject information the Requesting States seek directly concerns the operations and activities of EPA. 40 C.F.R. § 2.107(*l*)(2)(i). Specifically, the FOIA Request seeks information directly related to EPA's operations and activities related to its implementation and enforcement of the CAA through negotiated settlements with non-governmental organizations. These settlements directly imposed standards upon and/or required the State to take certain actions under the federal environmental program at issue in the lawsuit or administrative action.

In its enforcement of these federal programs through settlements with non-governmental organizations, EPA is using public funds and resources. The Tenth Circuit held that a federal agency's expenditure of public funds and resources was an operation and activity of that agency satisfying the first factor of the public interest prong. *Forest Guardians*, 416 F.3d at 1178; *see also Edmonds Inst. v. DOI*, 460 F. Supp. 2d 63, 66-67 (D.D.C. 2006). Similarly, EPA has devoted public funds to paying attorneys' fees and devoted public resources to negotiating and enforcing the settlements. Clearly, the Requesting States meet the first factor as the requested Subject information concerns the "operations or activities of the government." 40 C.F.R. § 2.107(*l*)(2)(i).

2. Second Factor: The FOIA Request Seeks Meaningful Information That Contributes to an Increased Public Understanding about EPA's Operations or Activities Regarding the CAA and SIPs.

In considering whether to grant the Requesting States fee waiver request, EPA must determine whether the requested Subject information is meaningfully informative and likely to contribute to an increase in public understanding about those operations or activities. 40 C.F.R. § 2.107(*l*)(2)(ii). The Requesting States FOIA Request seeks information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest. How a federal agency interacts with non-governmental interests in the formation of policy has been identified as an "issue of the utmost importance." *NRDC v. United States EPA*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). And "an understanding of how [a federal agency] makes policy decisions, including the **influence of any outside groups on this process**, is also important to the public's understanding of the [government]. *Forest Guardians*, 416 F.3d at 1179-80. (emphasis added).

With the release of this meaningful information the Requesting States will use it to educate the public about how EPA has elected to resolve litigation and administrative actions which directly affect the formation of current and future federal environmental policy. In *Western Watersheds v. DOI*, the U.S. District Court determined the requesting party satisfied the second factor by requesting information that it would use to educate the public about an agency's decision-making and its intent to create a summary of such information that was reader-friendly. 318 F. Supp. 2d at 1040-41. The U.S. District Court for the District of Columbia reached the same result in *Federal CURE* in holding the requesting party's intent to analyze and synthesize the requested information into a report relayed to the public via email and internet satisfied the second factor of the public interest prong. 602 F. Supp. 2d at 202-03. As explained in this FOIA Request, the Requesting States will prepare a report summarizing the Subject information which will be made available to the general public through the States' websites and the Library Systems of the Requesting States.

3. Third Factor: The FOIA Request Seeks Information That Contributes to the Understanding of a Broad Audience of Persons Interested in EPA's Operations or Activities Regarding the CAA and SIPs.

To satisfy the third factor, the requesting party must show that the requested information contributes to the understanding of a broad audience of persons interested in the subject. 40 C.F.R. § 2.107(*l*)(2)(iii). In *Forest Guardians*, the Court held that the requesting party satisfied the third factor by demonstrating its intent to broadly disseminate the compiled information, which was only available in piecemeal and hard-to-access form. *Forest Guardians*, 416 F.3d at 1181-82. As in *Forest Guardians*, the Requesting States seek piecemeal information that is held in a number of EPA's regional or other offices throughout the nation and which information cannot be easily accessed. The requested information relates to EPA's communications and documentation in a large number of discrete lawsuits and enforcement actions. *Id.* (holding information in court houses,

newspaper articles, and affidavits not sufficient to justify denying a fee waiver). The Requesting States will then compile and summarize this information into an easily accessible and readable report for their citizens and distribute copies of the report to Congress and the media.

As detailed above, the Requesting States intend to disseminate the requested information by making the report as well as the underling information publicly available on the Requesting States' websites as well as through the Library Systems of each of the Requesting States. Because the report will be posted on State government websites any American with access to the internet will have access to the report. Accordingly, the report will be available to better inform **all** U.S. citizens on matters affecting EPA's operations and policy formation. *See Judicial Watch Inc. v. U.S. DOI*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000) (requesting party's concrete plan or specific intent for publication and other dissemination of requested information demonstrates compliance with third factor). Further, the Requesting States stature as representatives of their respective citizens and accountability to their citizens to provide information affecting each State's implementation of the CAA demonstrates that the Requesting States can and will disseminate the requested information to a broad group of interested persons. *See Fed. CURE*, 602 F. Supp. 2d at 204 (stature of largest public advocacy group demonstrated ability to disseminate information to reasonably broad group).

Finally, the Requesting States will use the report to educate State and federal lawmakers regarding the activities of EPA in negotiating settlements with non-governmental organizations that directly affect current and future federal environmental policy. The report will provide invaluable information to these lawmakers as they consider future changes to environmental programs that will affect all Americans.

4. Fourth Factor: The FOIA Request Seeks Information That will Significantly Enhance the Public's Understanding of EPA's Operations or Activities Regarding the CAA and SIPs.

The intention of FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," *NRDC* at 496 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The Requesting States are seeking the Subject information so as to significantly enhance the public's understanding of EPA's operations and activities and to ensure that the public has the information necessary to determine whether EPA's actions in entering into settlements with non-governmental organizations are prudent or thwart the cooperative federalism approach embodied in many of the federal environmental programs. 40 C.F.R. § 2.107(*l*)(2)(iv). Further, the public currently has no access to the requested Subject information. Only with disclosure of the requested Subject information will the public's understanding of EPA's operations and activities be greater than "as compared to

the level of public understanding existing prior to the disclosure." 40 C.F.R. § 2.107(*l*)(2)(iv).

As detailed above, the Requesting States intend to prepare a report on EPA's decision-making process in negotiating and entering into certain litigation settlements and how these settlements are affecting current and future environmental policy. In taking the Subject information, which is not in the public domain, compiling it, and disseminating it to the public in easily accessible forums, the Requesting States meet the fourth factor. *Fed. CURE*, 602 F. Supp. 2d at 204-05. Clearly, the "public's understanding of EPA decision making will be significantly enhanced by learning about the nature and scope of EPA communication[s]" and as such the Requesting States fee waiver request must be granted. *NRDC* at 501.

B. The Requesting States' FOIA Request Satisfies the Commercial-Interest Prong of the Fee Waiver Test.

In considering whether the second prong of the public interest fee waiver test is met, EPA considers the existence and magnitude of the requesting party's commercial interest in the requested information and whether the commercial interest outweighs the public interest. 40 C.F.R. § 2.107(*l*)(3). The Requesting States are exclusively comprised of State governments, which are noncommercial entities that have no commercial interest in the disclosure of information regarding the manner in which EPA operates. *See Fed. CURE*, 602 F. Supp. 2d at 201 (recognizing non-profit organization is a non-commercial entity entitled to fee waiver). The Requesting States' intended use of the requested Subject information is to make the information available—free of charge—to their respective citizens in a readable, summarized fashion. The States have no intention of using the information disclosed for financial gain. Nor does making the information available to the public create a commercial interest for the Requesting States. Further, the public interest in disclosure necessarily is greater in magnitude than that of the Requesting States' complete lack of commercial interest in the requested information. 40 C.F.R. § 2.107(*l*)(3)(ii). The Requesting States have no commercial interest in the information requested and therefore satisfy the second prong of the fee waiver test.

In light of the ongoing and contentious public policy controversy regarding EPA's coordination and planning its regulatory agenda with non-governmental organizations, the Requesting States note that time is of the essence in this matter. There is a great need for prompt disclosure so that the released information may more adequately inform public understanding and discussion of EPA's actions.

In the event that access to any of the requested records is denied, please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We therefore request that the Requesting States be provided with all

non-exempt portions which are reasonably segregable. We further request that you describe the deleted material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies in this instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination, and in formulating arguments in case an appeal is taken. The EPA's written justification might also help to avoid unnecessary litigation. We of course reserve the right to appeal the withholding or deletion of any information and expect that you will list the office and address were such an appeal can be sent.

If for some reason, the fee waiver request is denied, while reserving my right to appeal such a decision, the Requesting States are willing to pay $5.00 (five dollars) to cover costs of document search and duplication.

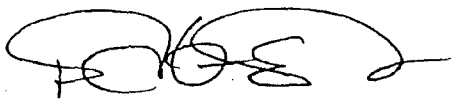
Access to the requested records should be granted within twenty (20) working days from the date of your receipt. Failure to respond in a timely manner shall be viewed as a denial of this request and the requesters may immediately file an administrative appeal.

Finally, the Requesting States ask that all correspondence regarding this FOIA request and all documents produced in response to this request be directed to the Attorney General of the State of Oklahoma.

Thanking you in advance for your prompt reply.

Sincerely,

E. Scott Pruitt
OKLAHOMA ATTORNEY GENERAL



P. Clayton Eubanks
DEPUTY SOLICITOR GENERAL
Office of Oklahoma Attorney General
(405) 522-8992 Fax (405) 522-0608
clayton.eubanks@oag.ok.gov

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

February 22, 2013

OFFICE OF
ENVIRONMENTAL INFORMATION

Mr. P. Clayton Eubanks
Deputy Solicitor General
Office of Oklahoma Attorney General
313 N. E. 21st Street
Oklahoma City, OK 73105

RE: Request Number EPA-HQ-2013-003886

Dear Mr. Eubanks:

This is in response to your request for a waiver of fees in connection with your Freedom of Information Act (FOIA) request to the U.S. Environmental Protection Agency (EPA) seeking a copy of records from the January 1, 2009 to February 6, 2013 regarding the scope and application of the non-discretionary duty to take certain action under the Clear Air Act; the course of action to take with respect to any Regional Haze State Implementation Plan; and other records as described in your request.

We have reviewed your fee waiver justification and based on the information provided, we are denying your request for a fee waiver. You have not expressed a specific intent to disseminate the information to the general public. As a result of you failing to meet the above criteria, accordingly, there is no need to address the remaining prongs of the fee waiver criteria. If the estimated cost exceeds $25.00 the Office of Air and Radiation will contact you regarding the cost of processing your request and seek an assurance of payment. They will be unable to process your request until they receive your written assurance of payment.

Under the FOIA, you have the right to appeal this determination to the National Freedom of Information Office, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, NW (2822T), Washington, DC 20460 (U.S. Postal Service Only), E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania

EXHIBIT
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Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, NW, Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI number listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Should you choose to appeal this determination, please be sure to fully address all factors required by EPA's FOIA Regulations, located at 40 C.F.R. § 2.107(l) in your appeal. If you have any questions concerning this determination please contact me at (202) 566-1667.

Sincerely,

Larry F. Gottesman
National FOIA Officer

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

March 15, 2013

VIA US CERTIFIED MAIL
RETURN RECEIPT REQUESTED,
FACSIMILE & E-MAIL

National Freedom of Information Officer
United States EPA
FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Fax: 202-566-2147
Email: Hq.foia@epa

Re: FREEDOM OF INFORMATION ACT APPEAL
Appeal of Fee Waiver Denial Pursuant to 40 C.F.R. § 2.104(j)
FOIA Request No. EPA-HQ-2013-003886

Dear Sir or Madam:

This is a timely appeal of the U.S. Environmental Protection Agency's ("**EPA**") improper denial of the Oklahoma Attorney General's request for a fee waiver in connection with the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah and Wyoming's ("**Requesting States**") February 6, 2013, Freedom of Information Act ("**FOIA**") request No. EPA-HQ-2013-003886. ("**FOIA Request**"). For the reasons stated in the FOIA Request, the Requesting States ask that this appeal be given expedited review.

I. BACKGROUND

As detailed in the FOIA Request, the Requesting States seek any and all documents regarding any consideration, proposal or discussions between the EPA Administrator with any Interested Organization or Other Organizations[1] concerning:

i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act ("**CAA**"), 42 U.S.C. § 7604(a)(2);

[1] Interested Organization and Other Organizations are defined in the Requesting States FOIA Request.

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EXHIBIT 3

ii. the course of action to take with respect to any Regional Haze State Implementation Plan ("**SIP**") required to be submitted to the U.S. Environmental Protection Agency ("**EPA**") pursuant to CAA § 169A for any State;

iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP (the "**Subject**").

A copy of the FOIA Request is attached hereto and incorporated by reference as Attachment A.

In its February 22, 2013 denial letter, EPA claims that the Requesting States' fee waiver request must be denied because "you have not expressed a **specific intent** to disseminate the information to the general public." A copy of EPA's Fee Waiver Denial is attached hereto and incorporated by reference as Attachment B. Respectfully, EPA asserted basis for denial of the Requesting States' fee waiver request is wholly without merit. In their FOIA Request the Requesting States make numerous statements that the documents requested from EPA will be disseminated to the general public.

- "The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report...The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues." FOIA Request at p. 5.

- "The Requesting States plan to make [the EPA] documents available to the public at the University, Federal Depository and State Library systems [ ] in the respective Requesting States. As these facilities are open to the **general public**, many people will thereby have access to the information contained in the materials which are the subject of this request." (emphasis added). FOIA Request at p. 5.

Because the information sought in the FOIA Request is in the public interest, will significantly contribute to the public's understanding of the operations and activities of EPA and will not be used to further any commercial interest, the Requesting States properly sought a fee waiver pursuant to 40 C.F.R. § 2.107(*l*). *See also generally* 5 U.S.C. § 552(a)(4)(A)(iii).

As set forth below, EPA's denial of the Requesting States' fee waiver request is factually incorrect and legally contrary to FOIA, EPA's own regulations, and case law interpreting and applying fee waiver regulations. Accordingly, the Requesting States request the immediate reversal of EPA's denial of the fee waiver request and that EPA be instructed to proceed forthwith in processing the FOIA Request.

II. THE REQUESTING STATES ARE ENTITLED TO A FEE WAIVER FOR THE FOIA REQUEST

A. The Requesting States' Purpose And Intent For The Requested Information

Over the past three years EPA has allowed its regulatory and policy agenda to be largely defined by litigation settlements it has entered into with non-governmental organizations. On at least forty-five occasions, EPA and other federal agencies have settled lawsuits (which included the payment of plaintiffs' attorneys' fees) brought under the CAA and other environmental statutory programs. These settlements take the form of binding Consent Decrees that dictate how and when EPA and other federal agencies must develop stringent new regulations or whether to approve certain permit applications. Unfortunately, States responsible for implementing many of these regulations and permit programs have little knowledge of or input in the litigation or settlement process.

The effective exclusion of the States from these litigation or administrative proceedings is directly inconsistent with the cooperative federalism approach to implementing many of the environmental programs created under the CAA. In implementing these federal environmental programs, States often must design plans that meet the individual circumstances of the State, while protecting and advancing the environmental goals and requirements of federal environmental law. However, these State efforts and plans are effectively superseded when EPA enters into negotiated settlements with non-governmental organizations alone that dictate how federal environmental law should be applied and implemented in an individual State. When the States' important role as a partner with EPA in implementing federal environmental programs is ignored, the States and their important sovereign interests are impaired, as are the rights of their citizens who rely on and expect the States to implement the federal environmental laws—not EPA along with non-governmental organizations.

The Requesting States seek the Subject information so that they may: understand and make public EPA's decision-making process in negotiating and entering into litigation settlements; utilize the Subject information to inform the preparation and participation in the public comment process on negotiated settlements between EPA and non-governmental organizations; utilize the Subject information to determine the extent to which the cooperative federalism principles embodied in the environmental programs, such as the CAA, are being eroded by these negotiated settlements; and use the Subject information to inform and educate the general public, and State and federal lawmakers on the importance of cooperative federalism and why the States should continue to have the lead role in implementing federal environmental programs.

As fully explained in the FOIA Request, the Requesting States will analyze the information presented in the released documents and our staff of experts will produce a report as

part of our review of EPA's operations. The report **will be disseminated to the general public by being posted on State government websites as well as to the media and all members of Congress**. Further, the underlying Subject information and the report will be made available to the public at the University, Federal Depository and State Library systems ("**Library System**") in the respective Requesting States. With the posting of the report on the States' websites and making the report available in the Library System, millions of people throughout the United States will have access to the Subject information and resulting report.

Additionally, most, if not all, of these Libraries also serve as a Federal Depository. Federal Depository Libraries were "established by Congress to ensure that the American public has access to its Government's information." http://www.gpo.gov/libraries/. As Federal Depositories, these libraries ensure that the agency publications and other information "are highly visible to the public, promoted, and safeguarded." *Id.* Moreover, making available the requested Subject information and report at University Libraries will facilitate the teaching and research occurring at these Universities on important public policy issues including cooperative federalism and the State federal partnership. None of the requested Subject information or the resulting report will be used for commercial use or gain.

B. Legal Standard for Fee Waivers

FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver test "should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver. *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1039 (D. Id. 2004). FOIA imposes a non-discretionary duty to provide documents without any charge if the disclosed information satisfies a two-prong test established by statute. *Fed. CURE v. Lappin*, 602 F.Supp. 2d 197, 202 (D.D.C. 2009) (documents "*shall* be furnished without any charge" if two-prong test is satisfied (emphasis and omission in original)). First, the disclosed information must be likely to significantly contribute to public understanding of governmental operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii). Second, the disclosed information cannot be primarily in the commercial interests of the requester. *Id.*

EPA has promulgated regulations detailing the specific factors it considers when evaluating the two-prong statutory test for fee waiver requests. 40 C.F.R. § 2.107(*l*)(2)-(3). EPA's regulations elucidate further that to be granted fee waiver requests it must be established that the information requested for disclosure must pertain to and significantly contribute to the public understanding of governmental operations and activities. As the FOIA Request demonstrates and this appeal further explains, the Requesting States have clearly met all of the statutory and regulatory requirements necessary to be granted a fee waiver.

1. First Factor: The FOIA Request is for Records Concerning EPA's Operations and Activities.

As detailed in the FOIA Request, the Subject information the Requesting States seek disclosure of directly concerns the operations and activities of EPA. 40 C.F.R. § 2.107(*l*)(2)(i). Specifically, the FOIA Request seeks information directly related to EPA's operations and activities related to its implementation and enforcement of the CAA's Regional Haze program through negotiated settlements with non-governmental organizations. These settlements directly imposed standards upon and/or required the State to take certain actions under the CAA.

In its enforcement of the CAA through settlements with non-governmental organizations, EPA is using public funds and resources. The Tenth Circuit held that a federal agency's expenditure of public funds and resources was an operation and activity of that agency satisfying the first factor of the public interest prong. *Forest Guardians*, 416 F.3d at 1178; *see also Edmonds Inst. v. DOI*, 460 F. Supp. 2d 63, 66-67 (D.D.C. 2006). Similarly, EPA has devoted public funds to paying attorneys' fees and devoted public resources to negotiating and enforcing the settlements. Clearly, the Requesting States meet the first factor as the requested Subject information concerns the "operations or activities of the government." 40 C.F.R. § 2.107(*l*)(2)(i).

2. Second Factor: The FOIA Request Seeks Meaningful Information That Contributes to an Increased Public Understanding about EPA's Operations or Activities Regarding the CAA and SIPs.

In considering whether to grant the Requesting States fee waiver request, EPA must determine whether the requested Subject information is meaningfully informative and likely to contribute to an increase in public understanding about those operations or activities. 40 C.F.R. § 2.107(*l*)(2)(ii). The Requesting States FOIA Request seeks information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest. How a federal agency interacts with non-governmental interests in the formation of policy has been identified as an "issue of the utmost importance." *NRDC v. United States EPA*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). And "an understanding of how [a federal agency] makes policy decisions, including the **influence of any outside groups on this process**, is also important to the public's understanding of the [government]. *Forest Guardians*, 416 F.3d at 1179-80. (emphasis added).

With the release of this meaningful information the Requesting States will use it to educate the public about how EPA has elected to resolve litigation and administrative actions which directly affect the formation of current and future federal environmental policy. In *Western Watersheds v. DOI*, the U.S. District Court determined the requesting party satisfied the second factor by requesting information that it would use to educate the public about an agency's decision-making and its intent to create a summary of such information that was reader-friendly. 318 F. Supp. 2d at 1040-41. The U.S. District Court for the District of Columbia reached the same result in *Federal CURE* in holding the requesting party's intent to analyze and synthesize

the requested information into a report relayed to the public via email and internet satisfied the second factor of the public interest prong. 602 F. Supp. 2d at 202-03. As explained in its FOIA Request, the Requesting States will prepare a report summarizing the Subject information which will be made available to the general public through the States' websites and the Library Systems of the Requesting States.

3.Third Factor: The FOIA Request Seeks Information That Contributes to the Understanding of a Broad Audience of Persons Interested in EPA's Operations or Activities Regarding the CAA and SIPs.

To satisfy the third factor, the requesting party must show that the requested information contributes to the understanding of a broad audience of persons interested in the subject. 40 C.F.R. § 2.107(*l*)(2)(iii). In *Forest Guardians*, the Court held that the requesting party satisfied the third factor by demonstrating its intent to broadly disseminate the compiled information, which was only available in piecemeal and hard-to-access form. *Forest Guardians*, 416 F.3d at 1181-82. As in *Forest Guardians*, the Requesting States seek piecemeal information that is held in a number of EPA's regional or other offices throughout the nation and which information cannot be easily accessed. The requested information relates to EPA's communications and documentation in a number of discrete administrative proceedings and lawsuits. *Id.* (holding information in court houses, newspaper articles, and affidavits not sufficient to justify denying a fee waiver). The Requesting States will then compile and summarize this information into an easily accessible and readable report for their citizens and distribute copies of the report to the general public, Congress and the media.

As detailed above, the Requesting States will disseminate the requested information to the general public by making the report as well as the underling information publicly available on the Requesting States' websites as well as through the Library Systems of each of the Requesting States. Because the report will be posted on State government websites any American with access to the internet will have access to the report. Accordingly, the report will be available to better inform **all** U.S. citizens on matters affecting EPA's operations and policy formation. *See Judicial Watch Inc. v. U.S. DOI*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000) (requesting party's concrete plan or specific intent for publication and other dissemination of requested information demonstrates compliance with third factor). Further, the Requesting States stature as representatives of their respective citizens and accountability to their citizens to provide information affecting each State's implementation of the CAA demonstrates that the Requesting States can and will disseminate the requested information to a broad group of interested persons. *See Fed. CURE*, 602 F. Supp. 2d at 204 (stature of largest public advocacy group demonstrated ability to disseminate information to reasonably broad group).

Finally, the Requesting States will use the report to educate State and federal lawmakers regarding the activities of EPA in negotiating settlements with non-governmental organizations that directly affect current and future federal environmental policy. The report will provide

invaluable information to these lawmakers as they consider future changes to environmental programs that will affect all Americans.

4. Fourth Factor: The FOIA Request Seeks Information That Will Significantly Enhance the Public's Understanding of EPA's Operations or Activities Regarding the CAA and SIPs.

The intention of FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," *NRDC* at 496 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The Requesting States are seeking the Subject information so as to significantly enhance the public's understanding of EPA's operations and activities and to ensure that the public has the information necessary to determine whether EPA's actions in entering into settlements with non-governmental organizations are prudent or thwart the cooperative federalism approach embodied in the CAA. 40 C.F.R. § 2.107(*l*)(2)(iv). Further, the public currently has no access to the requested Subject information. Only with disclosure of the requested Subject information will the public's understanding of EPA's operations and activities be greater than "as compared to the level of public understanding existing prior to the disclosure." 40 C.F.R. § 2.107(*l*)(2)(iv).

As detailed above, the Requesting States will prepare a report on EPA's decision-making process in negotiating and entering into certain litigation settlements and how these settlements are affecting current and future environmental policy. In taking the Subject information, which is not in the public domain, compiling it, and disseminating it to the public in easily accessible forums, the Requesting States meet the fourth factor. *Fed. CURE*, 602 F. Supp. 2d at 204-05. Clearly, the "public's understanding of EPA decision-making will be significantly enhanced by learning about the nature and scope of EPA communication[s]" and as such the Requesting States fee waiver request must be granted. *NRDC* at 501.

C. The Requesting States' FOIA Request Satisfies the Commercial-Interest Prong of the Fee Waiver Test.

In considering whether the second prong of the public interest fee waiver test is met, EPA considers the existence and magnitude of the requesting party's commercial interest in the requested information and whether the commercial interest outweighs the public interest. 40 C.F.R. § 2.107(*l*)(3). The Requesting States are exclusively comprised of State governments, which are noncommercial entities that have no commercial interest in the disclosure of information regarding the manner in which EPA operates. *See Fed. CURE*, 602 F. Supp. 2d at 201 (recognizing non-profit organization is a non-commercial entity entitled to fee waiver). The Requesting States' use of the requested Subject information is to make the information available—free of charge—to their respective citizens in a readable, summarized fashion. The States have no intention of using the information disclosed for financial gain. Nor does making the information available to the public create a commercial interest for the Requesting States. Further, the public interest in disclosure necessarily is greater in magnitude than that of the

Requesting States' complete lack of commercial interest in the requested information. 40 C.F.R. § 2.107(*l*)(3)(ii). The Requesting States have no commercial interest in the information requested and therefore satisfy the second prong of the fee waiver test.

III. CONCLUSION

The Requesting States are entitled to a fee waiver because the information sought will benefit the public's understanding as to how environmental laws are being manipulated to usurp the authority of States via Consent Decrees between EPA and non-governmental organizations—negotiations that leave the affected State or States entirely out of the process. The impact of these EPA settlements on current and future environmental policy is significant and impacts all Americans who are either directly or indirectly affected by EPA regulation and policy. Further, the Requesting States are making the Subject information available to the public and receive absolutely no financial benefit from the information. As such, the Requesting States respectfully request that EPA's fee waiver denial be reversed and that all fees related to responding to the FOIA Request be waived, and that EPA respond to the Requesting States' FOIA Request.

Sincerely,

P. Clayton Eubanks
Deputy Solicitor General

PCE:esn
Attachments

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

February 6, 2013

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

FREEDOM OF INFORMATION ACT REQUEST

Freedom of Information Officer
U.S. EPA, Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Hq.foia@epa.
FOIA REQUEST

Dear Sir or Madam:

This is a request under the Freedom of Information Act (5 U.S.C. § 552, as amended).

By this letter the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah and Wyoming ("**Requesting States**") are requesting any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2009, to the date of this letter that discuss or in any way relates to:

(a) any consideration, proposal or discussions with any Interested Organization (as that term is defined below), or any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy ("**Other Organizations**"), concerning:

i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act ("**CAA**"), 42 U.S.C. § 7604(a)(2);

ATTACHMENT "A"

313 N.E. 21ST STREET • OKLAHOMA CITY, OK 73105 • (405) 521-3921 • FAX: (405) 521-6246

ii. the course of action to take with respect to any Regional Haze State Implementation Plan ("**SIP**") required to be submitted to the U.S. Environmental Protection Agency ("**EPA**") pursuant to CAA § 169A for any State;

iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP (the "**Subject**").

"**Interested Organizations**" is defined as any one of the following organizations:

- National Parks Conservation Association
- Montana Environmental Information Center
- Grand Canyon Trust
- Dine Citizens Against Ruining Our Environment
- Dakota Resource Council
- Dacotah Chapter of Sierra Club
- San Juan Citizens Alliance
- Our Children's Earth Foundation
- Plains Justice
- Powder River Basin Resource Council
- Sierra Club
- Environmental Defense Fund
- Wildearth Guardians
- Natural Resources Defense Council
- Western Resource Advocates
- Wyoming Outdoor Council
- Greater Yellowstone Coalition

(b) Copies of any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) sent or received by the following EPA offices:

i. the Office of the Administrator;
ii. the Office of Environmental Information;
iii. the Office of General Counsel;
iv. the Office of Inspector General;

v. the Office of International and Tribal Affairs;
vi. the Office of Research and Development;
vii. Region 1;
viii. Region 2;
ix. Region 3;
x. Region 4;
xi. Region 5;
xii. Region 6;
xiii. Region 7;
xiv. Region 8;
xv. Region 9; or
xvi. Region 10.

(including receipt by carbon copy or blind carbon copy), regarding the Subject including, but not limited to, documents sent by or received from individuals representing or employed by the Interested Organizations or Other Organizations.

Reason for FOIA Request

Over the past three years, the EPA has allowed its regulatory agenda to be largely defined by litigation settlements it has entered into with environmental organizations. Specifically, on at least forty-five occasions, EPA and other federal agencies have settled lawsuits (which included paying plaintiffs' attorneys' fees) brought under the CAA. These settlements take the form of binding Consent Decrees that dictate how and when EPA and other federal agencies must develop stringent new regulations. Unfortunately, States responsible for implementing many of these regulations have little knowledge of or input in this process, which is not consistent with the cooperative federalism structure of federal environmental law.

Out of the forty-five settlements that have been made public, EPA has paid almost $1 million in attorneys' fees to these groups, while also committing to develop a suite of sweeping new regulations. One EPA Consent Decree led to the promulgation of EPA's costliest regulation ever - the Mercury Air Toxics Standards (MATS). Other Consent Decrees include obligations that define how and when EPA acts on forty-five individual State Regional Haze SIPs – including the imposition of proposed federal implementation plans ("**FIPs**").

Many Consent Decrees authorize EPA to act in a way that is not consistent with current law. For example, Regional Haze Consent Decrees allowed EPA to propose combined Regional Haze SIPs/FIPs – something EPA has not done before in administering the CAA.

This is detrimental to the States and "unwinds" the State and federal partnership contained in the CAA.

States affected by these non-governmental organization lawsuits are not included as parties in the suits and when affected States try to intervene, EPA and the environmental groups frequently oppose State intervention. For instance, when the State of North Dakota sought to intervene in *Wildearth Guardians v. Jackson* in the U.S. District Court for the Northern District of California (where Wildearth Guardians filed its suit), EPA opposed the intervention despite the fact that the case involved how and when EPA should act on North Dakota's proposed Regional Haze SIP. *Wildearth Guardians v. Jackson*, No. C-09-2453-CW, 2011 U.S. Dist. LEXIS 14378 (N.D. Cal. Dec. 27, 2011) (order denying North Dakota's intervention).

State Attorneys General from the Requesting States are in the process of evaluating EPA's alarming practice of relying on Consent Decrees to deny the States their important role as a partner with EPA in implementing federal environmental law. Not only does EPA's action harm and jeopardize the States' role as a partner with EPA, but it harms the interests of the citizens of the Requesting States. Our citizens rely on and expect the States to implement federal environmental law. Often, these implementation efforts require the States to design plans to meet the individual circumstances of the State, while protecting and advancing the environmental goals and requirements of federal environmental law. When EPA coordinates with non-governmental organizations regarding how federal environmental law should be applied and implemented in an individual State and excludes the State from that effort the State and its citizens are harmed.

Rather than make individual FOIA requests, the Requesting States are making one request for the release of documents with the Interested Organizations and Other Organizations concerning the Subject. The Requesting States have lobbied, litigated, and publicly commented on federal actions which directly affect their individual State interests and those of their citizens. The requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States.

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA's operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

Fee Waiver Request

The Requesting States request that you waive any applicable fees since disclosure meets the standard for waiver of fees as it is in the public interest. *See* 40 C.F.R. § 2.107(l). Specifically, this request concerns "the operations or activities of the government;" disclosure is "likely to contribute" to an understanding of government operations or activities; disclosure will contribute to "public understanding;" the disclosure is likely to contribute "significantly" to public understanding of government operations and activities; and the States have no commercial interest in disclosure of the documents – the Requesting States' interest is to facilitate and promote the public interest. 40 C.F.R. § 2.107(2)(i),(iv).

Reasons for Granting the Fee Waiver Request

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA's operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

The Requesting States plan to make these documents available to the public at the University, Federal Depository and State Library systems ("**Library Systems**") in the respective Requesting States. As these facilities are open to the general public, many people will thereby have access to the information contained in the materials which are the subject of this request. Most, if not all, of these Libraries also serve as a Federal Depository. Federal Depository Libraries were "established by Congress to ensure that the American public has access to its Government's information." http://www.gpo.gov/libraries/. As Federal Depositories, these libraries ensure that the agency publications and other information "are highly visible to the public, promoted, and safeguarded." *Id.* Moreover, making available the requested Subject information and report at University Libraries will facilitate the teaching and research occurring at these Universities on important public policy issues including cooperative federalism and the State federal partnership. None of the requested Subject information or the resulting report will be used for commercial use or gain.

A. Legal Standard for Fee Waivers

FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver test "should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver. *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1039 (D. Id. 2004). FOIA imposes a non-discretionary duty to provide documents without any charge if the disclosed information

satisfies a two-prong test established by statute. *Fed. CURE v. Lappin*, 602 F.Supp. 2d 197, 202 (D.D.C. 2009) (documents "*shall* be furnished without any charge" if two-prong test is satisfied (emphasis and omission in original)). First, the disclosed information must be likely to significantly contribute to public understanding of governmental operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii). Second, the disclosed information cannot be primarily in the commercial interests of the requester. *Id.*

EPA has promulgated regulations detailing the specific factors it considers when evaluating the two-prong statutory test for fee waiver requests. 40 C.F.R. § 2.107(*l*)(2)-(3). EPA's regulations elucidate further that to be granted fee waiver requests a requester must establish that the information requested for disclosure must pertain to and significantly contribute to the public understanding of governmental operations and activities. As this FOIA Request demonstrates, the Requesting States have clearly met all of the statutory and regulatory requirements necessary to be granted a fee waiver.

1. First Factor: The FOIA Request is for Records Concerning EPA's Operations and Activities.

The Subject information the Requesting States seek directly concerns the operations and activities of EPA. 40 C.F.R. § 2.107(*l*)(2)(i). Specifically, the FOIA Request seeks information directly related to EPA's operations and activities related to its implementation and enforcement of the CAA through negotiated settlements with non-governmental organizations. These settlements directly imposed standards upon and/or required the State to take certain actions under the federal environmental program at issue in the lawsuit or administrative action.

In its enforcement of these federal programs through settlements with non-governmental organizations, EPA is using public funds and resources. The Tenth Circuit held that a federal agency's expenditure of public funds and resources was an operation and activity of that agency satisfying the first factor of the public interest prong. *Forest Guardians*, 416 F.3d at 1178; *see also Edmonds Inst. v. DOI*, 460 F. Supp. 2d 63, 66-67 (D.D.C. 2006). Similarly, EPA has devoted public funds to paying attorneys' fees and devoted public resources to negotiating and enforcing the settlements. Clearly, the Requesting States meet the first factor as the requested Subject information concerns the "operations or activities of the government." 40 C.F.R. § 2.107(*l*)(2)(i).

2. Second Factor: The FOIA Request Seeks Meaningful Information That Contributes to an Increased Public Understanding about EPA's Operations or Activities Regarding the CAA and SIPs.

In considering whether to grant the Requesting States fee waiver request, EPA must determine whether the requested Subject information is meaningfully informative and likely to contribute to an increase in public understanding about those operations or activities. 40 C.F.R. § 2.107(*l*)(2)(ii). The Requesting States FOIA Request seeks information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest. How a federal agency interacts with non-governmental interests in the formation of policy has been identified as an "issue of the utmost importance." *NRDC v. United States EPA*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). And "an understanding of how [a federal agency] makes policy decisions, including the **influence of any outside groups on this process**, is also important to the public's understanding of the [government]. *Forest Guardians*, 416 F.3d at 1179-80. (emphasis added).

With the release of this meaningful information the Requesting States will use it to educate the public about how EPA has elected to resolve litigation and administrative actions which directly affect the formation of current and future federal environmental policy. In *Western Watersheds v. DOI*, the U.S. District Court determined the requesting party satisfied the second factor by requesting information that it would use to educate the public about an agency's decision-making and its intent to create a summary of such information that was reader-friendly. 318 F. Supp. 2d at 1040-41. The U.S. District Court for the District of Columbia reached the same result in *Federal CURE* in holding the requesting party's intent to analyze and synthesize the requested information into a report relayed to the public via email and internet satisfied the second factor of the public interest prong. 602 F. Supp. 2d at 202-03. As explained in this FOIA Request, the Requesting States will prepare a report summarizing the Subject information which will be made available to the general public through the States' websites and the Library Systems of the Requesting States.

3. Third Factor: The FOIA Request Seeks Information That Contributes to the Understanding of a Broad Audience of Persons Interested in EPA's Operations or Activities Regarding the CAA and SIPs.

To satisfy the third factor, the requesting party must show that the requested information contributes to the understanding of a broad audience of persons interested in the subject. 40 C.F.R. § 2.107(*l*)(2)(iii). In *Forest Guardians*, the Court held that the requesting party satisfied the third factor by demonstrating its intent to broadly disseminate the compiled information, which was only available in piecemeal and hard-to-access form. *Forest Guardians*, 416 F.3d at 1181-82. As in *Forest Guardians*, the Requesting States seek piecemeal information that is held in a number of EPA's regional or other offices throughout the nation and which information cannot be easily accessed. The requested information relates to EPA's communications and documentation in a large number of discrete lawsuits and enforcement actions. *Id.* (holding information in court houses,

newspaper articles, and affidavits not sufficient to justify denying a fee waiver). The Requesting States will then compile and summarize this information into an easily accessible and readable report for their citizens and distribute copies of the report to Congress and the media.

As detailed above, the Requesting States intend to disseminate the requested information by making the report as well as the underling information publicly available on the Requesting States' websites as well as through the Library Systems of each of the Requesting States. Because the report will be posted on State government websites any American with access to the internet will have access to the report. Accordingly, the report will be available to better inform **all** U.S. citizens on matters affecting EPA's operations and policy formation. *See Judicial Watch Inc. v. U.S. DOI*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000) (requesting party's concrete plan or specific intent for publication and other dissemination of requested information demonstrates compliance with third factor). Further, the Requesting States stature as representatives of their respective citizens and accountability to their citizens to provide information affecting each State's implementation of the CAA demonstrates that the Requesting States can and will disseminate the requested information to a broad group of interested persons. *See Fed. CURE*, 602 F. Supp. 2d at 204 (stature of largest public advocacy group demonstrated ability to disseminate information to reasonably broad group).

Finally, the Requesting States will use the report to educate State and federal lawmakers regarding the activities of EPA in negotiating settlements with non-governmental organizations that directly affect current and future federal environmental policy. The report will provide invaluable information to these lawmakers as they consider future changes to environmental programs that will affect all Americans.

4. Fourth Factor: The FOIA Request Seeks Information That will Significantly Enhance the Public's Understanding of EPA's Operations or Activities Regarding the CAA and SIPs.

The intention of FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," *NRDC* at 496 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The Requesting States are seeking the Subject information so as to significantly enhance the public's understanding of EPA's operations and activities and to ensure that the public has the information necessary to determine whether EPA's actions in entering into settlements with non-governmental organizations are prudent or thwart the cooperative federalism approach embodied in many of the federal environmental programs. 40 C.F.R. § 2.107(*l*)(2)(iv). Further, the public currently has no access to the requested Subject information. Only with disclosure of the requested Subject information will the public's understanding of EPA's operations and activities be greater than "as compared to

the level of public understanding existing prior to the disclosure." 40 C.F.R. § 2.107(*l*)(2)(iv).

As detailed above, the Requesting States intend to prepare a report on EPA's decision-making process in negotiating and entering into certain litigation settlements and how these settlements are affecting current and future environmental policy. In taking the Subject information, which is not in the public domain, compiling it, and disseminating it to the public in easily accessible forums, the Requesting States meet the fourth factor. *Fed. CURE*, 602 F. Supp. 2d at 204-05. Clearly, the "public's understanding of EPA decision making will be significantly enhanced by learning about the nature and scope of EPA communication[s]" and as such the Requesting States fee waiver request must be granted. *NRDC* at 501.

B. The Requesting States' FOIA Request Satisfies the Commercial-Interest Prong of the Fee Waiver Test.

In considering whether the second prong of the public interest fee waiver test is met, EPA considers the existence and magnitude of the requesting party's commercial interest in the requested information and whether the commercial interest outweighs the public interest. 40 C.F.R. § 2.107(*l*)(3). The Requesting States are exclusively comprised of State governments, which are noncommercial entities that have no commercial interest in the disclosure of information regarding the manner in which EPA operates. *See Fed. CURE*, 602 F. Supp. 2d at 201 (recognizing non-profit organization is a non-commercial entity entitled to fee waiver). The Requesting States' intended use of the requested Subject information is to make the information available—free of charge—to their respective citizens in a readable, summarized fashion. The States have no intention of using the information disclosed for financial gain. Nor does making the information available to the public create a commercial interest for the Requesting States. Further, the public interest in disclosure necessarily is greater in magnitude than that of the Requesting States' complete lack of commercial interest in the requested information. 40 C.F.R. § 2.107(*l*)(3)(ii). The Requesting States have no commercial interest in the information requested and therefore satisfy the second prong of the fee waiver test.

In light of the ongoing and contentious public policy controversy regarding EPA's coordination and planning its regulatory agenda with non-governmental organizations, the Requesting States note that time is of the essence in this matter. There is a great need for prompt disclosure so that the released information may more adequately inform public understanding and discussion of EPA's actions.

In the event that access to any of the requested records is denied, please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We therefore request that the Requesting States be provided with all

non-exempt portions which are reasonably segregable. We further request that you describe the deleted material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies in this instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination, and in formulating arguments in case an appeal is taken. The EPA's written justification might also help to avoid unnecessary litigation. We of course reserve the right to appeal the withholding or deletion of any information and expect that you will list the office and address were such an appeal can be sent.

If for some reason, the fee waiver request is denied, while reserving my right to appeal such a decision, the Requesting States are willing to pay $5.00 (five dollars) to cover costs of document search and duplication.

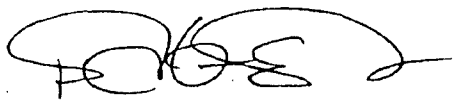
Access to the requested records should be granted within twenty (20) working days from the date of your receipt. Failure to respond in a timely manner shall be viewed as a denial of this request and the requesters may immediately file an administrative appeal.

Finally, the Requesting States ask that all correspondence regarding this FOIA request and all documents produced in response to this request be directed to the Attorney General of the State of Oklahoma.

Thanking you in advance for your prompt reply.

Sincerely,

E. Scott Pruitt
OKLAHOMA ATTORNEY GENERAL



P. Clayton Eubanks
DEPUTY SOLICITOR GENERAL
Office of Oklahoma Attorney General
(405) 522-8992 Fax (405) 522-0608
clayton.eubanks@oag.ok.gov

SENDER: COMPLETE THIS SECTION

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- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Freedom Info Officer
US EPA Rec, FOIA
1200 Pennsylvania, NW
Washington, DC (2822T)
20460

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C. Signature

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

February 22, 2013

OFFICE OF
ENVIRONMENTAL INFORMATION

Mr. P. Clayton Eubanks
Deputy Solicitor General
Office of Oklahoma Attorney General
313 N. E. 21st Street
Oklahoma City, OK 73105

RE: Request Number EPA-HQ-2013-003886

Dear Mr. Eubanks:

This is in response to your request for a waiver of fees in connection with your Freedom of Information Act (FOIA) request to the U.S. Environmental Protection Agency (EPA) seeking a copy of records from the January 1, 2009 to February 6, 2013 regarding the scope and application of the non-discretionary duty to take certain action under the Clear Air Act; the course of action to take with respect to any Regional Haze State Implementation Plan; and other records as described in your request.

We have reviewed your fee waiver justification and based on the information provided, we are denying your request for a fee waiver. You have not expressed a specific intent to disseminate the information to the general public. As a result of you failing to meet the above criteria, accordingly, there is no need to address the remaining prongs of the fee waiver criteria. If the estimated cost exceeds $25.00 the Office of Air and Radiation will contact you regarding the cost of processing your request and seek an assurance of payment. They will be unable to process your request until they receive your written assurance of payment.

Under the FOIA, you have the right to appeal this determination to the National Freedom of Information Office, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, NW (2822T), Washington, DC 20460 (U.S. Postal Service Only), E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania

ATTACHMENT "B"

Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, NW, Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI number listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Should you choose to appeal this determination, please be sure to fully address all factors required by EPA's FOIA Regulations, located at 40 C.F.R. § 2.107(l) in your appeal. If you have any questions concerning this determination please contact me at (202) 566-1667.

Sincerely,

Larry F. Gottesman
National FOIA Officer

Dear Mr. Eubanks:

I am writing in regard to the above-referenced fee waiver appeal. My office is in receipt of your appeal file and is currently reviewing it for a response. We require a brief extension of time to complete the process of reviewing and finalizing the response. We expect to provide you with a determination on or before May 15, 2013. Thank you for your patience, and please contact me if you have any questions concerning your appeal.

Sincerely,

Lynn Kelly
Attorney-Advisor
U.S. Environmental Protection Agency
General Law Office
Office of General Counsel
(202) 564-3266
Office # 7426V

RE: Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)
Kelly, Lynn
to:
Clayton.Eubanks@oag.ok.gov
05/15/2013 03:10 PM
Hide Details
From: "Kelly, Lynn" <Kelly.Lynn@epa.gov>
To: "Clayton.Eubanks@oag.ok.gov" <Clayton.Eubanks@oag.ok.gov>,
History: This message has been forwarded.

Mr. Eubanks:

I am writing with an update about the status of the above-referenced fee waiver appeal. My office is reviewing your appeal file, however we require one additional extension of time to complete the process of finalizing the response. We expect to provide you with a determination on or before May 31, 2013. Thank you again for your continued patience, and please contact me if you have any questions concerning your appeal.

Sincerely,

Lynn Kelly
Attorney-Advisor
U.S. Environmental Protection Agency
General Law Office
Office of General Counsel
(202) 564-3266
Office # 7426V

From: Clayton.Eubanks@oag.ok.gov [mailto:Clayton.Eubanks@oag.ok.gov]
Sent: Thursday, May 02, 2013 11:23 AM
To: Kelly, Lynn
Subject: Re: Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)

Thank you.

P. Clayton Eubanks
Deputy Solicitor General
Office of the Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105
Tel: (405) 522-8992
Fax:(405) 522-0085
clayton.eubanks@oag.ok.gov

From: "Kelly, Lynn" <Kelly.Lynn@epa.gov>
To: "clayton.eubanks@oag.ok.gov" <clayton.eubanks@oag.ok.gov>,
Date: 05/02/2013 10:20 AM
Subject: Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)

EXHIBIT 5

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 3 1 2013

OFFICE OF
GENERAL COUNSEL

Mr. P. Clayton Eubanks
Deputy Solicitor General
Office of Oklahoma Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105

Re: Freedom of Information Act Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)

Dear Mr. Eubanks:

I am responding to your March 15, 2013 fee waiver appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. You appealed the February 22, 2013 decision of Larry Gottesman of the U.S. Environmental Protection Agency ("EPA" or "Agency") to deny your request for a fee waiver ("initial fee waiver denial"). You seek a waiver of all fees associated with your FOIA request for documents related to consideration, proposal, or discussion of three subjects related to the Clean Air Act ("CAA") with non-governmental organizations whose purpose may include environmental or natural resource advocacy and policy. You requested a waiver of all fees associated with processing your request, and stated you were willing to pay $5.00 (five dollars) in the event your fee waiver was denied.

On February 22, 2013, Mr. Gottesman, the EPA's National FOIA Officer, denied your request for a fee waiver finding that you had failed to express specific intent to disseminate the information to the general public, thus failing to demonstrate that your request is likely to contribute to public understanding of a reasonably broad audience of persons interested in the subject matter.

I have carefully considered your request for a fee waiver, EPA's initial fee waiver denial, and your appeal. For the reasons set forth below, I have concluded that you do not have a proper request pending before the Agency, and therefore your appeal of the denial of a waiver of fees is moot.

Analysis

In reviewing your February 6, 2013 FOIA request in order to process your fee waiver appeal, this office has determined that your initial request fails to adequately describe the records sought, as required by the FOIA and by EPA's regulations. 5 U.S.C. § 552(a)(3); 40 C.F.R. § 2.102(c). You seek records "which discuss or in any way relate to" any "consideration, proposal,

EXHIBIT
tabbies 4

or discussion with" "Interested Organizations" or any "Other Organizations" on three broad topics related to the Clean Air Act. Request at 1. At least one category of your request (records described in paragraph (a)(i)) is almost identical to a request that was previously denied by EPA as improper on September 14, 2012. While you have tailored the subject matter of the next two categories of records you are seeking ((a)(ii) and (a)(iii)) by focusing only on Regional Haze State Implementation Plans ("SIPs"), you have not provided enough information to permit an employee reasonably familiar with the subject matter to identify the records you are seeking. This is because despite reducing the provided list of "Interested Organizations" from eighty to seventeen, you are still requesting documents related to any communication between EPA and "Other Organizations" which you broadly define as "any other non-governmental organization, including citizen organizations whose purpose or interest may include environmental or natural resource advocacy and policy." Request at 1. This qualifying statement about requesting records from "Other Organizations" effectively re-incorporates the sixty-three excluded organization from the list in your original request, as well as numerous other unnamed organizations, and would require EPA staff to also search for and determine the organizational mission of any 3rd party that may have had a communication with the Agency on topics under the CAA. Broad, sweeping requests lacking specificity are not sufficient. American Fed. of Gov't Employees v. Dep't of Commerce, 632 F.Supp. 1272, 1277 (D.D.C.1986). Additionally, requests for documents which "refer or relate to" a subject are routinely "subject to criticism as overbroad since life, like law, is 'a seamless web,' and all documents 'relate' to all others in some remote fashion." Massachusetts v. Dep't of Health & Human Servs., 727 F.Supp. 35, 36 n.2 (D.Mass 1989).

Additionally, paragraph (b) of your request is nearly identical to the request previously denied by EPA as an improper request on September 14, 2012. Instead of requesting "all documents" that in any way relate to the three broad categories of your request from every single headquarters and regional EPA office, you have requested records from sixteen different offices instead of twenty-one. Request at 2-3. You are requesting all documents sent or received by staff in sixteen EPA offices on three general subjects, for a period of almost four and a half years. Such "all documents" requests have been found by courts to be improper. *See*, Dale v. IRS, 238 F.Supp 2d 99, 104 (D.D.C. 2002); Mason v. Callaway, 554 F.2d 129, 131 (4th Cir.1977). By way of comparison, a recent District of Columbia decision found that a similar request that amounted to a request for all internal emails of 25 individuals over a two year period failed to reasonably describe the records sought, and was unreasonably burdensome. Hainey v. U.S. Dep't of Interior, No. 11-1725 (2013 WL 659090 (D.D.C.)). The court found that the burden of amassing this volume of information, in addition to the time needed to review the records, conflicted with settled case law that "an agency need not honor a [FOIA] request that requires 'an unreasonably burdensome search'" and that "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors." Id. At *8-9 (internal citations omitted).

For the reasons stated above, I have determined that your request does not reasonably identify the records you are seeking. Because this is your second attempt at submitting a properly formulated request, I will take this opportunity to indicate how your request might be modified to reasonably identify the records you are seeking. In order to reasonably identify the records you are seeking, you should identify the records with particular specificity. EPA regulations state that "whenever possible you should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter" and also that "[t]he more specific you are about the records or type of records you want, the more likely EPA will be able to identify and locate records responsive to your request." 40 C.F.R. § 2.103(c). Often this is accomplished by providing key words which employees may use to easily search for and determine if there are responsive records. For example, should you limit your request to records communicating with any *specifically identified* organization AND referencing settlement relating to the three subject areas you identify, your request would enable EPA staff familiar with the subject area to search for and locate any responsive records.

Because I have determined that you do not have a proper request pending before the Agency, your appeal of EPA's initial denial of a fee waiver for your request is moot, and I am closing your appeal file. Although I need not address the merits of your fee waiver request and appeal at this time, I have included the following discussion in order to assist you in submitting any properly formulated request for records and a waiver of fees.

Fee Waiver Discussion

The statutory standard for evaluating fee waiver requests is whether "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government; and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

EPA's regulations at 40 C.F.R. § 2.107(l)(2) and (3) establish the same standard. EPA must consider four conditions to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns the operations or activities of the Federal government; (2) whether the disclosure is likely to contribute to an understanding of government operations or activities; (3) whether the disclosure is likely to contribute to public understanding of a reasonably broad audience of persons interested in the subject matter; and (4) whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2). EPA must consider two conditions to determine whether a request is primarily in the commercial interest of the requester: (1) whether the requester has a commercial interest that would be furthered by the requested documents; and (2) whether any such commercial interest outweighs the public interest in disclosure. 40 C.F.R. § 2.107(l)(3).

Finally, the Agency considers fee waiver requests on a case-by-case basis. Judicial Watch, Inc. v. DOJ, 185 F. Supp. 2d 54, 60 (D.D.C. 2002). Whether a requester may have

received a fee waiver in the past is not relevant for a subsequent request.

Public Interest Prong of the Fee Waiver Test

A requester seeking a fee waiver bears the burden of showing that the disclosure of the responsive documents is in the public interest and is not primarily in the requester's commercial interest. See Judicial Watch, Inc., 185 F. Supp. 2d at 60; Larson v. CIA, 843 F. 2d 1481, 1483 (D.C. Cir. 1988). Conclusory statements or mere allegations that the disclosure of the requested documents will serve the public interest are not sufficient to meet the burden. See McClellan Ecological Seepage Situation, 835 F.2d at 1285; Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1312 (D.C. Cir. 2003). The requester must therefore explain with reasonable specificity how disclosure of the requested information is in the public interest by demonstrating how such disclosure is likely to contribute significantly to public understanding of government operations or activities. Larson, 843 F.2d at 1483. Furthermore, if the circumstances surrounding this request (e.g., the content of the request, the type of requester, the purpose for which the request is made, the requester's ability to disseminate the information to the public) clarify the point of the request, the requester must set forth these circumstances. See Larson, 843 F.2d at 1483.

Elements 2 and 4

I will discuss the second and fourth factors of the public interest prong at the same time. The second factor to consider is the informative value of the documents to be disclosed. 40 C.F.R. § 2.107(l)(2)(ii). The requested documents must be "meaningfully informative about government operations or activities in order to be 'likely to contribute' to an increased public understanding of those operations or activities." 40 C.F.R. § 2.107(l)(2)(ii). The disclosure of information already in the public domain would have no informative value since it would not add to the public's understanding of government. Id. The fourth factor to consider is how the disclosure of the requested records is likely to contribute "significantly" to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2)(iv). Disclosure of the information should significantly enhance the public's understanding of the subject in question as compared to the level of public understanding prior to disclosure. Id.

In support of your request, you generally state that "[t]he requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States." Request at 4. You also state that "disclosure 'is likely to contribute' to an understanding of government operations or activities'" and "disclosure is likely to contribute 'significantly' to public understanding of government operations and activities" (repeating the regulatory

standard). Request at 5. These general statements are typically insufficient to support a waiver of fees . Judicial Watch Inc. v. DOJ, 185 F.Supp 2d 54, 61-62 (D.D.C. 2002). You also state that "the public currently has no access to the requested Subject information," however information about the Clean Air Act, Regional Haze, and the public comment process around negotiated settlements is available on the Agency's program website[1] as well as on the websites of the Regional Planning Organizations' and States' sites. Request at 8; Appeal at 7.

Your less generalized statements in support of factors two and four also fail to demonstrate that your request satisfies the standard established by these elements. You state that your request seeks "information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest," that will help "understand and make public EPA's decision-making process in negotiating and entering into litigation settlements," and will educate the public on "the importance of cooperative federalism and why the States should continue to have the lead role in implementing federal environmental programs." Request at 7; Appeal at 3. As compared to the broad categories of your request, there is no clear nexus between the records requested and the areas of education identified above. For example, your request is in no way limited to communications with non-governmental organizations, or to discussions about cooperative federalism. Numerous records you have requested will not shed any light on these subjects, and you have not explained how all of the requested records will meaningfully inform the public about these stated topics.

Element 3

Additionally, the requester seeking a fee waiver must also demonstrate that the disclosure of the requested documents will likely contribute to the public understanding, *i.e.*, the understanding of "a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." 40 C.F.R. § 107(l)(2)(iii). The requester's expertise in the subject area and his or her "ability and intention to effectively convey information to the public will be considered." Id. A requester must express a specific intent to publish or disseminate the requested information, and identify a specific increase in public understanding that would result from such dissemination. Judicial Watch, Inc.v. DOJ, 122 F. Supp. 2d 5, 10 (D.D.C. 2000). A requester who does not provide specific information regarding a method of disseminating requested information will not meet the third factor, even if the requester has the ability to disseminate information. Judicial Watch, Inc. V. DOJ, 122 F. Supp. 2d 13, 18-19 (D.D.C. 2000).

---

[1] *See, e.g.* http://www.epa.gov/airquality/visibility/program.html; http://www.epa.gov/airquality/visibility/actions.html.

You state that the "Requesting States" will compile and summarize the requested records into a report that will be distributed to the general public, the media, and Congress. Appeal at 6. You also state that the report will be available state libraries and web sites. Id. These general statements do not provide enough information to demonstrate a tangible or cognizable plan to disseminate the information. See, Van Fripp v. Parks, 2000 U.S. Dist. LEXIS 20158, *20 (D.D.C. Mar. 16, 2000) ("Obtaining placement in a library is, at best, a passive method of distribution that does not discharge the plaintiff's affirmative burden to disseminate information."). While it is possible that a report written using information obtained from the Agency could be informative, these general statements about passive methods of distribution, especially when unaccompanied by details about the authorship of a report by the staff of thirteen different state governments or about the intended audience, fails to demonstrate a specific intent to publish or disseminate the requested information.

This discussion above is being provided to you in order to assist you in understanding the Agency's obligations to evaluate fee waiver requests using the standards contained in EPA's regulations and the FOIA. Should you choose to submit a new request, please feel free to contact the Agency's FOIA Office for information about what you may provide in order to submit a proper request, and to provide the information necessary for the Agency to evaluate a request for a fee waiver.

Conclusion

This letter constitutes EPA's final determination on this matter. Pursuant to 5 U.S.C. 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have your principal place of business, or the district in which the records are situated, or in the District of Columbia. As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 301-837-1996 or 1-877-684-6448; and facsimile, 301-837-0348.

Please call Lynn Kelly at 202-564-3266 if you have any questions regarding this determination.

Sincerely,

Kevin M. Miller
Assistant General Counsel
General Law Office

cc: HQ FOI Office

From: Al Armendariz
To: Layla Mansuri
Subject: Re: FOIA requests for the NM and OK FIPs
Date: 01/20/2011 08:07 PM

Thanks.

Al

Al Armendariz
Regional Administrator
U.S. EPA
Region 6
armendariz.al@epa.gov
office: 214-665-2100
twitter: @al_armendariz
▼ Layla Mansuri

----- Original Message -----
From: Layla Mansuri
Sent: 01/20/2011 04:30 PM CST
To: Al Armendariz; Chrissy Mann; Lawrence Starfield; Javier Balli
Cc: Carrie Clayton
Subject: Fw: FOIA requests for the NM and OK FIPs

FYI.

----- Forwarded by Layla Mansuri/R6/USEPA/US on 01/20/2011 04:29 PM -----

From: Agustin Carbo-Lugo/R6/USEPA/US
To: Layla Mansuri/R6/USEPA/US@EPA
Date: 01/20/2011 04:11 PM
Subject: Re: Fw: FOIA requests for the NM and OK FIPs

Layla,

After talking to Joe Kordzi, we have decided to request additional time for both NM and OK's FOIAs. I am requesting an additional time of 30 days from today. Still have no reply from the attorneys. We are only limiting the scope for the OK FOIA, for questions 3 and 4. You may want to wait until I receive confirmation on this one. Most of NM's requests are already in the e docket for the NPRM. We decided to continue uploading in the box all the emails related just to the San Juan Generating Station (as stated in the request).

Hope this helps :)

Agustin F. Carbo-Lugo
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 6

1445 Ross Ave. (6-RC-M)
Dallas, TX 75202
Tel: (214) 665-8037
Fax: (214) 665-2182

-----Layla Mansuri/R6/USEPA/US wrote: -----
To: Agustin Carbo-Lugo/R6/USEPA/US@EPA
From: Layla Mansuri/R6/USEPA/US
Date: 01/20/2011 04:01PM
Cc: Chrissy Mann/R6/USEPA/US@EPA, Leticia Lane/R6/USEPA/US@EPA, Yerusha Beaver/R6/USEPA/US@EPA
Subject: Re: Fw: FOIA requests for the NM and OK FIPs

Agustin:

Hi. Just following up.

I have a couple of questions.

1. What are the current deadlines?
2. Was there any narrowing to the requests? Is this in the works?

Thanks.
Layla

Agustin Carbo-Lugo---01/18/2011 10:11:57 AM---Layla, I'll be helping PD with both FOIA requests. In December we requested an extension of time on

From: Agustin Carbo-Lugo/R6/USEPA/US

To: Layla Mansuri/R6/USEPA/US@EPA

Date: 01/18/2011 10:11 AM

Subject: Fw: FOIA requests for the NM and OK FIPs

Layla,

I'll be helping PD with both FOIA requests. In December we requested an extension of time on the OK FOIA and it appears it was granted. This morning I had a meeting with PD and we will be requesting to narrow the scope of the request. I should have more information this afternoon. I'll get back to you.

Agustin F. Carbo-Lugo
Office of Regional Counsel

U.S. Environmental Protection Agency, Region 6
1445 Ross Ave. (6-RC-M)
Dallas, TX 75202
Tel: (214) 665-8037
Fax: (214) 665-2182
----- Forwarded by Agustin Carbo-Lugo/R6/USEPA/US on 01/18/2011 10:07 AM -----

From: Lucinda Watson/R6/USEPA/US

To: Suzanne Smith/R6/USEPA/US@EPA, Ben Harrison/R6/USEPA/US@EPA

Cc: Agustin Carbo-Lugo/R6/USEPA/US@EPA, Yerusha Beaver/R6/USEPA/US@EPA, Carrie Thomas/R6/USEPA/US@EPA

Date: 01/13/2011 04:40 PM

Subject: Re: Fw: FOIA requests for the NM and OK FIPs

OGC (Kevin and Geoff) and I think we need to assign Agustin and Yerusha to handle the FOIA coordination for the NM and OK FIPs documents.

It is my understanding that Joe worked with Richard Wessels and is getting the LotusNotes links prepared for R6, RTP, and DC.

But we believe that we need a lawyer, e.g., Agustin, to call the requestors and narrow the scope.
Agustin also could work with Joe to get the time estimates and work with whomever in RTP and DC to get their time estimates.
Agustin and Joe could draft now the letter suspending the request until we get a sufficient fee commitment.
Since it will be Agustin's first huge FOIA assignment, I am sure he will need to turn to Yerusha for assistance.

OGC is willing to offer any legal assistance from their FOIA experts since much of the information concerns business information, contractor information, although I feel like Paul already has explained EPA's position on these materials and PD seems to understand.

FOIA Exemption (b)(5) - Deliberative Process Privilege [redacted]

Re: Fw: FOIA requests for the NM and OK FIPs

Re: Fw: FOIA requests for the NM and OK FIPs

Carrie Thomas to: Lucinda Watson 01/13/2011 02:48 PM

Cc: Agustin Carbo-Lugo, Suzanne Smith, Yerusha Beaver

Hi Lucinda,
I agree with Geoff's comments.

For the original QF/FP FOIA, we did suspend the request in writing until we were able to get a sufficient fee commitment from the requestor ($10,000 for the R6 response). We suggested that amount based on a cost estimate after we asked everyone with responsive documents to guess how long it would take them to respond. We are continuing to send rolling responses until we hit that amount, which we are very close to doing. We are also going to contact the requestor to ask if they would like to commit additional fees to cover the remainder of the response and a denial log of what we are withholding and why.

We also asked the requestor to narrow the scope, but they were under no obligation to do so. They did, in fact, narrow it slightly (hence the list of excluded records in the instructions e-mail).

Yerusha - correct me if I've misstated anything. Thanks,

Carrie K. Thomas
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 6
1445 Ross Ave. (6-RC-M)
Dallas, TX 75202
Tel: (214) 665-7121
Fax: (214) 665-2182

Lucinda Watson---01/13/2011 12:49:49 PM---For the QF/FP FOIA, did we first contact them to try to narrow the request? Next, did we send

a let

From: Lucinda Watson/R6/USEPA/US

To: Carrie Thomas/R6/USEPA/US@EPA, Suzanne Smith/R6/USEPA/US@EPA

Cc: Agustin Carbo-Lugo/R6/USEPA/US@EPA

Date: 01/13/2011 12:49 PM

Subject: Fw: FOIA requests for the NM and OK FIPs

For the QF/FP FOIA, did we first contact them to try to narrow the request?
Next, did we send a letter suspending our response until they agreed to pay the estimated amount?

Of course, I cannot figure out how we would have an estimate until everyone has finished their search for responsive documents?

Bottom line - how do I answer OGC's e-mail so we sound like we know what we are doing?

----- Forwarded by Lucinda Watson/R6/USEPA/US on 01/13/2011 12:47 PM -----

Re: Fw: FOIA requests for the NM and OK FIPs

Geoffrey Wilcox to: Joe Kordzi 01/12/2011 05:22 PM

Cc: Lea Anderson, Todd Hawes, Kevin McLean, Lucinda Watson, Agustin Carbo-Lugo

---

PRIVILEGED COMMUNICATION

Joe:

Let's have a chat about this topic.

Unless something has changed, my understanding is that there are some standard protocols we usually follow in such FOIA requests.

One of the first steps is to alert the requestor that they need to narrow their request because it is overbroad, and secondarily that it will probably cost more than the amount of $ they agreed to pay.

Unless and until they respond to that, and tell us they will pay more, we usally tell them in writing that we are suspending our response to their request until they get back to us.

Lucinda and Augustin may have more recent experience than me in dealing with such things.

If not, we may want to call one of the OGC FOIA gurus for a consultation. FOIA Exemption (b)(5) - Deliberative Process Privilege

G

Joe Kordzi---01/12/2011 04:09:20 PM---yes thanks - I've called Mr. Orkin to inform him I think the bill would exceed $500. He hasn't resp

From: Joe Kordzi/R6/USEPA/US

To: Lea Anderson/DC/USEPA/US@EPA

Cc: Geoffrey Wilcox/DC/USEPA/US@EPA, Todd Hawes/RTP/USEPA/US@EPA

Date: 01/12/2011 04:09 PM

Subject: Re: Fw: FOIA requests for the NM and OK FIPs

yes thanks - I've called Mr. Orkin to inform him I think the bill would exceed $500. He hasn't responded yet.

Regards,

Joe

" ... and miles to go before I sleep."
-- Robert Frost

Lea Anderson---01/12/2011 02:13:06 PM---Joe, I assume (hopefully) that we are at least charging the requestor for our search time? Please

From: Lea Anderson/DC/USEPA/US

To: Joe Kordzi/R6/USEPA/US@EPA

Cc: Geoffrey Wilcox/DC/USEPA/US@EPA, Todd Hawes/RTP/USEPA/US@EPA

Date: 01/12/2011 02:13 PM

Subject: Re: Fw: FOIA requests for the NM and OK FIPs

Joe,
I assume (hopefully) that we are at least charging the requestor for our search time? Please let me know if I should keep track of the time spend on the search.

thanks,
Lea

M. Lea Anderson
EPA Office of General Counsel
Phone: (202) 564-5571

Joe Kordzi---01/12/2011 01:58:30 PM---Welcome to my FOIAs. I will separately send you some Lotus Notes buttons and instructions so you ca

From: Joe Kordzi/R6/USEPA/US

To: Geoffrey Wilcox/DC/USEPA/US@EPA, Lea Anderson/DC/USEPA/US@EPA, Todd Hawes/RTP/USEPA/US@EPA

Date: 01/12/2011 01:58 PM

Subject: Fw: FOIA requests for the NM and OK FIPs

Welcome to my FOIAs. I will separately send you some Lotus Notes buttons and instructions so you can load your emails.

Regards,

Joe

" ... and miles to go before I sleep."
-- Robert Frost

----- Forwarded by Joe Kordzi/R6/USEPA/US on 01/12/2011 12:52 PM -----

From: Joe Kordzi/R6/USEPA/US

To: R6 6PD-L

Cc: Lucinda Watson/R6/USEPA/US@EPA, Agustin Carbo-Lugo/R6/USEPA/US@EPA

Date: 01/04/2011 11:19 AM

Subject: FOIA requests for the NM and OK FIPs

Enclosed are two extensive FOIA requests. The first one is related to our just proposed NM regional haze SIP-FIP, and mainly concerns the San Juan Generating Station. The second one basically requests everything we have concerning the OK regional haze SIP-FIP which we are currently working on. [redacted] I looked into getting drop boxes set up for you to submit your emails, but balked at the 33 page set of instructions that accompanied it, and the lack of an easy, workable way to get those emails to the requestor, so we will do it the old fashioned way. If you have anything that is responsive, pls print it off and give it to me. If that includes documents, pls put them on a CD and name them in such a way the requestor will know which email they go with. I cannot provide guidance on what can be released. According to ORC, we should have all taken that training and are apparently on our own. I'm sorry for not starting this earlier, but I was busy with the FIPs and my efforts to get clarification/help on this didn't work out.

1. The due date for the NM FOIA was 12/30/10. This is the second FOIA on this subject from the same person. A request has been made to get an extension, but as before, the requestor has not been responsive to that request. I think much of what is requested will actually be in the docket in a day or so. However, you may have emails that are responsive.

2. The due date for the OK regional haze SIP-FIP has been extended to 1/15/11, but the requestor expected we would do a rolling submittal, that for the reasons outlined above, didn't work out. Therefore, pls also assume we are also late on this one as well. Because we have not yet proposed our decision on this action, I expect much of what is requested will not be able to be released, but that if you to decide. Here is something that may help: foia.navy.mil/Exemptionb5Slides.ppt

Pls have everything to me by noon, 1/11/11. If that's not possible, pls let me know ASAP.

[attachment "SJGS FOIA.pdf" deleted by Lea Anderson/DC/USEPA/US] [attachment "OK SIP-FIP FOIA.pdf" deleted by Lea Anderson/DC/USEPA/US]

Regards,

Joe

" ... and miles to go before I sleep."
-- Robert Frost

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21
OKLAHOMA CITY, OK 73105

RECEIVED JUL 2 2 2013

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Bob Perciasepe, Acting Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

FIRST CLASS MAIL

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS. FOLD AT DOTTED LINE

91 7199 9991 7032 0593 0232

AO440(Rev.12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Oklahoma

STATE OF OKLAHOMA, et al.)

Plaintiff(s),)

v.) Case No. CIV-13-726-M

ENVIRONMENTAL PROTECTION AGENCY,)

Defendant(s).)

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*
Bob Perciasepe, Acting Administrator
Environmental Protection Agency
Ariel Rios Building - 1200 Pennsylvania Avenue, NW
Washington, DC 20460

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) - or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12(a)(2) or (3) - you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

E. SCOTT PRUITT, OKLAHOMA ATTORNEY GENERAL
P. CLAYTON EUBANKS, DEPUTY SOLICITOR GENERAL
313 NE 21st STREET
OKLAHOMA CITY, OK 73105

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

SUMMONS ISSUED:

9:37 am, Jul 18, 2013

ROBERT D. DENNIS, Clerk

By: Nancy Rhea
Deputy Clerk

Signed and sealed by the Clerk of the Court or Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA *ex rel.* SCOTT PRUITT, in his official capacity as Attorney General of Oklahoma;	)	
STATE OF ALABAMA, by and through LUTHER STRANGE, in his official capacity as Attorney General of Alabama 501 Washington Avenue Montgomery, AL 36130;	)	Case No.
STATE OF ARIZONA, by and through TOM HORNE, in his official capacity as Attorney General of Arizona 1275 W. Washington Street Phoenix, AZ 85007;	)	
STATE OF GEORGIA, by and through SAMUEL S. OLENS, ATTORNEY GENERAL OF THE STATE OF GEORGIA 40 Capitol Square SW Atlanta, GA 30334;	)	
STATE OF KANSAS *ex rel.* DEREK SCHMIDT, in his official capacity as Attorney General of Kansas 120 SW 10th Avenue, 2nd Floor Topeka, KS 66612;	)	
STATE OF NEBRASKA, by and through JON C. BRUNING, ATTORNEY GENERAL OF THE STATE OF NEBRASKA 2115 State Capitol P.O. Box 98920 Lincoln, NE 68509;	)	
BILL SCHUETTE, ATTORNEY GENERAL OF THE STATE OF MICHIGAN,	)	

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA *ex rel.* SCOTT PRUITT, in his official capacity as Attorney General of Oklahoma;	)	
STATE OF ALABAMA, by and through LUTHER STRANGE, in his official capacity as Attorney General of Alabama 501 Washington Avenue Montgomery, AL 36130;	)	Case No.
STATE OF ARIZONA, by and through TOM HORNE, in his official capacity as Attorney General of Arizona 1275 W. Washington Street Phoenix, AZ 85007;	)	
STATE OF GEORGIA, by and through SAMUEL S. OLENS, ATTORNEY GENERAL OF THE STATE OF GEORGIA 40 Capitol Square SW Atlanta, GA 30334;	)	
STATE OF KANSAS *ex rel.* DEREK SCHMIDT, in his official capacity as Attorney General of Kansas 120 SW 10th Avenue, 2nd Floor Topeka, KS 66612;	)	
STATE OF NEBRASKA, by and through JON C. BRUNING, ATTORNEY GENERAL OF THE STATE OF NEBRASKA 2115 State Capitol P.O. Box 98920 Lincoln, NE 68509;	)	
BILL SCHUETTE, ATTORNEY GENERAL OF THE STATE OF MICHIGAN,	)	

ON BEHALF OF)
THE PEOPLE OF MICHIGAN;)
G. Mennen Williams Building, 7th Floor)
525 W. Ottawa St.)
P.O. Box 30212)
Lansing, MI 48909)
)
STATE OF NORTH DAKOTA, by and)
through, WAYNE STENEHJEM, ATTORNEY)
GENERAL OF THE STATE OF)
NORTH DAKOTA)
State Capitol)
600 E. Boulevard Ave., Dept. 125)
Bismarck, ND 58505;)
)
STATE OF SOUTH CAROLINA)
ex rel. ALAN WILSON, in his official)
capacity as Attorney General of South)
Carolina)
Rembert Dennis Building)
1000 Assembly Street, Room 519)
Columbia, SC 29201;)
)
STATE OF TEXAS, by and through)
GREG ABBOTT, ATTORNEY GENERAL)
OF THE STATE OF TEXAS)
300 W. 15th Street)
Austin, TX 78701;)
)
STATE OF UTAH, by and through)
JOHN SWALLOW, ATTORNEY GENERAL)
OF UTAH)
Utah State Capitol Complex)
350 North State Street Suite 230)
SLC, UT 84114;)
)
STATE OF WYOMING)
123 Capitol Building)
200 W. 24th Street)
Cheyenne, WY 82002,)

Plaintiffs,	)
v.	)
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,	)
Defendant.	)

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs, the States of Oklahoma, Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah and Wyoming, [1] bring this action against Defendant the United States Environmental Protection Agency ("EPA") to compel compliance with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq.* As set forth below, under FOIA, the States sought records from EPA concerning the agency's implementation of a specific federal Clean Air Act ("CAA") program, 42 USC § 7401 *et seq.*. In violation of FOIA, EPA has denied the States' request. As grounds therefore, Plaintiffs allege as follows:

JURISDICTION AND VENUE

1. The Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. §

[1] At this time only the Attorney General of Oklahoma is admitted to practice before this Court. On behalf of the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah and Wyoming, the Attorney General of Oklahoma, pursuant to LCvR83.3(c), will be filing with the Court a Motion for Relief from LCvR83.2. Because the Attorney General of Oklahoma is the lead Plaintiff and will be filing all pleadings in this matter, the other State Attorneys General respectfully seek relief from the requirement that they each be required to be admitted pro hac vice.

552(a)(4)(A)(vii). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706.

2. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

PARTIES

3. Plaintiffs are the State of Oklahoma with an address of 313 NE 21st Street, Oklahoma City, Oklahoma 73105; and the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah and Wyoming. Bill Schuette, Attorney General of Michigan, is bringing this action on behalf of the People of Michigan under Mich. Comp. Law § 14.28, which provides that the Michigan Attorney General may "appear for the people of [Michigan] in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of [Michigan] may be a party or interested." Under Michigan's constitution, the people are sovereign. Mich. Const. art. I, § 1 ("All political power is inherent in the people. Government is instituted for their equal benefit, security, and protection.").

4. Defendant is an agency of the United States Government and is headquartered in the Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington D.C. 20460. Defendant has possession, custody and control of records to which Plaintiffs seek access.

BACKGROUND

I. FOIA AND FEE WAIVER REQUESTS

5. FOIA requires agencies of the federal government to release requested records to the public unless one or more statutory exemptions apply. *See* 5 U.S.C. § 552(b).6.

6. When making a FOIA request, the requesting party must "reasonably describe such records" requested. 5 U.S.C. § 552(a)(3). EPA's FOIA regulations state that requesting parties:

> should reasonably describe the records [they] are seeking in a way that will permit EPA employees to identify and locate them. Whenever possible, [the requestor] should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, [the requestor] should include any file designations or descriptions for the records [requested]. The more specific [the requestor is] about the records or type of records [requested], the more likely EPA will be able to identify and locate records responsive to [the] request.

40 C.F.R. § 2.102

7. FOIA also mandates fee waiver or reduction when "disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii).

8. Congress intended that the assessment of fees not be a bar to private individuals or public interest groups seeking access to government records. Both FOIA and the legislative history of the relevant FOIA provision call for a liberal interpretation of the fee waiver standard. "Documents shall be furnished without any charge or at a charge

reduced below the fees established ... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). ("A requester is likely to contribute significantly to public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government." 132 Cong. Rec. H9464 (Reps. English and Kindness)).

9. FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI*, 416 F.3d 1173, 1178 (10th Cir. 2005).

10. A recent study found that EPA disproportionately denies fee waiver requests from noncommercial requesters who seek records so as to understand whether EPA is faithfully complying with applicable law. According to the Competitive Enterprise Institute's ("CEI") study, 92 percent of the time EPA grants fee waiver requests from noncommercial requesters who are supportive of EPA's policies and agendas, but denies a majority of fee waiver requests from noncommercial requesters who are critical of EPA. *See EPA Gives Info For Free to Big Green Groups 92% of Time; Denies 93% of Fee Waiver Requests from Biggest Conservative Critic,* Competitive Enterprise Institute, May 14, 2013, http://cei.org/news-releases/epa-gives-info-free-big-green-groups-92-time-denies-93-fee-waiver-requests-biggest-con.

II. THE CLEAN AIR ACT

11. The CAA establishes "a comprehensive national program that makes the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). At the same time, the CAA recognizes that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3); *see also id.* § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . ."). Under the CAA, one way that the control of air pollution is achieved is through the States implementation of national ambient air quality standards ("NAAQS") (CAA §110). The CAA directs EPA's Administrator to promulgate NAAQS and provides for the adoption of State Implementation Plans ("SIPs") to achieve and maintain those standards. The "primary" NAAQS prescribe maximum acceptable concentrations of various pollutants in the ambient air, which, "allowing an adequate margin of safety, are requisite to protect the public health." CAA § 109(b)(1). The statute provides that the primary NAAQS for each targeted pollutant be based on "air quality criteria" that "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health...which may be expected from the presence of such pollutant in the ambient air, in varying quantities." CAA § 108(a)(2).

12. EPA must review each NAAQS at least every five years. CAA § 109(d)(1). In conducting each such review, EPA must conduct notice-and-comment rulemaking

pursuant to CAA § 307(d). CAA § 307(d)(1)(A). The adoption of a new or revised NAAQS triggers a standard implementation process in which "[e]ach State shall have the primary responsibility for assuring air quality" within its boundaries "by submitting an implementation plan for such State which will specify the manner in which national primary . . . ambient air quality standards will be achieved and maintained . . . ." CAA § 107(a).

13. In contrast to the NAAQS, the CAA's Visibility Protection Program is a non-health based program built around the goal, set forth in Section 169A(a)(1) of the CAA, of the "prevent[ing] of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas, which impairment results from manmade air pollution." Recognizing that visibility impairment does not rise to the same level of public policy concern as dangers to public health, Congress made the visibility improvement goal discretionary. Thus, under Section 169A(f), for purposes of the citizens suit provision of the statute, the national visibility goal "shall not be considered to be a 'non-discretionary duty' of the Administrator."

14. In furtherance of the Section 169A visibility goal, the Visibility Protection Program directs States to develop Regional Haze SIPs to ensure "reasonable progress" is made toward the visibility goal, including satisfying certain requirements for identifying best available retrofit technology ("BART"). *See* 42 U.S.C. § 7491-7492. In 1999, EPA promulgated Regional Haze Rules that require all States to revise their federal CAA SIPs to address visibility in nearby national parks and wilderness areas known as Class I areas.

These rules were the subject of several federal court challenges. *See American Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002), *Center for Energy and Economic Development v. EPA*, 398 F.3d 653 (D.C. Cir. 2005), and *Utility Air Regulatory Group v. EPA*, 471 F.3d 1333, 1338 (D.C. Cir. 2006). In *American Corn Growers* the D.C. Circuit made clear that States have great discretion in setting reasonable progress goals and determining BART. The CAA's "provisions give [] the States broad authority over BART determinations." *American Corn Growers*, 291 F.3d 19.

15. Specifically, Section 169A of the CAA provides that the States shall have the dominant role in making a BART determination, with EPA having only a more limited role. Second, because visibility improvement is an aesthetic goal, the CAA does not make improving visibility conditions in Class I areas paramount above all other competing considerations. Instead, the States are given broad discretion to weigh public interest factors in determining (a) how much progress towards improving visibility they deem to be reasonable and (b) whether particular BART controls, or any BART controls at all, should be imposed on a particular source, based on a balancing of the cost of controls and the visibility improvement benefits that such controls will produce. EPA may not second-guess those State judgments so long as the States' determinations are consistent with Section 169A of the CAA and are reasonable and rationally supported by the State's administrative record reflecting the data and analysis used to come to those determinations.

16. In addition to making and submitting BART determinations to EPA, CAA § 169A(b)(2), requires EPA to issue regulations requiring States containing Class I areas, or States whose emissions may reasonably be anticipated to cause or contribute to visibility impairment in a Class I area, to submit SIPs containing "such emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting" the national visibility goal. The amount of progress that is "reasonable" is not defined according to objective criteria, but instead involves a discretionary balancing by the State of public interest factors, specifically "the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements." CAA § 169A(g)(1).

17. Notably, CAA Section 169A is clear that it is the States, not EPA, that make both the reasonable progress and BART determination decisions. Section 169A(b)(2)(A) specifically provides that both the reasonable progress and the BART determinations are "determined by the State." Section 169A(g)(2) similarly provides that "in determining [BART], the State" shall weigh the BART factors.

III. STATEMENT OF FACTS

18. On February 6, 2013, the States of Oklahoma, Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, South Carolina, Texas, Utah and Wyoming submitted a FOIA request to EPA for records concerning EPA's negotiations with certain

non-governmental organizations that have led to binding consent decrees that dictate when and how EPA must proceed concerning various States' Regional Haze SIPs. *See* Exhibit 1. The States' FOIA request explained that EPA's practice of settling litigation via consent decrees with certain non-governmental organizations is of great concern because such decrees then define EPA's regulatory approach to State Regional Haze SIPs without the States involvement, yet the States must bear the consequences of EPA's process and implement these regulatory changes. The States expressed concern that EPA's actions were not consistent with the cooperative federalism structure of the CAA or the Regional Haze program.

19. The February 6, 2013 FOIA request was submitted after EPA denied the States' previous FOIA request for records concerning EPA's practice of entering into consent decrees with non-governmental organizations in cases concerning the implementation of several environmental programs, not just the Regional Haze program. EPA denied the States' previous FOIA request asserting that the request was overbroad and that there was no demonstration that the records would be disseminated to the general public. At the time EPA denied the States' previous FOIA request, EPA advised Oklahoma Deputy Solicitor General Eubanks in a telephone conversation that the States should resubmit FOIA requests for records concerning individual environmental programs and specific cases and that EPA would review those requests.

20. The States' FOIA request makes clear the type, scope and location of the records sought from EPA. Specifically, the States' FOIA request asks for any and all documents sent and/or received by specific EPA offices, including the office of the Administrator, that discuss or in any way relates to:

(a) any consideration, proposal or discussions with any Interested Organization (as that term is defined below), or any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy, concerning:

i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the CAA, 42 U.S.C. § 7604(a)(2);

ii. the course of action to take with respect to any Regional Haze SIP required to be submitted to the EPA pursuant to CAA § 169A for any State;

iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP.

"Interested Organizations" is defined as any one of the following organizations:

-National Parks Conservation Association
-Montana Environmental Information Center
-Grand Canyon Trust
- Dine Citizens Against Ruining Our Environment
- Dakota Resource Council
- Dacotah Chapter of Sierra Club
- San Juan Citizens Alliance
-Our Children's Earth Foundation
-Plains Justice
-Powder River Basin Resource Council
-Sierra Club

-Environmental Defense Fund
-Wildearth Guardians
-Natural Resources Defense Council
-Western Resource Advocates

See Exhibit 1 at 1-3.

21. Clearly set forth in the States' FOIA request was a fee waiver request based on the fact that the States' request is in the public interest and therefore EPA must waive any applicable fees associated with fully responding to the request. *See* 40 C.F.R. § 2.107(l). The States' FOIA request clearly sets forth that the requested documents will be made available to the public at the University, Federal Depository and State Library systems located in each of the requesting States. *See* Exhibit 1 at 5. Additionally, the States will analyze the data presented in the requested records and will produce a report as part of their ongoing review of EPA's operations. *See id.* The report will be disseminated to others in the States as well as disseminated to the media and Congress as a component of the States' active involvement in "State efforts addressing environmental issues." *See id.* The States' FOIA request averred that none of the requested documents or the resulting report will be used for commercial use or gain. *See id.*

22. By letter dated February 22, 2013, EPA denied the States' fee waiver request, claiming that the States had "not expressed a specific intent to disseminate the information to the general public." *See* Exhibit 2 at 1.

23. On March 15, 2013 the States timely filed their appeal of EPA's denial of the States' fee waiver request. *See* Exhibit 3.

24. By email dated May 2, 2013, EPA stated that it required "a brief extension of time" until May 15, 2013 to complete its review and respond to Oklahoma's March 15 appeal. *See* Exhibit 4. On May 15, 2013, EPA sent the office of the Attorney General of Oklahoma an email informing Oklahoma that EPA required yet another extension of time until May 31, 2013 to complete its review and issue a determination of whether Oklahoma's fee waiver request should be granted. *See* Exhibit 5.

25. By letter dated May 31, 2013, EPA denied the States' FOIA request. *See* Exhibit 6. In its denial letter, EPA claims that the States' FOIA request "fails to adequately describe the records sought," and therefore the request was denied. Exhibit 6 at 1. EPA's denial of the States' FOIA request is consistent with their apparent protocol to avoid compliance with FOIA by telling requestors that their FOIA request is overbroad. In a recent email exchange disclosed by EPA as a result of a FOIA request, an EPA official advises a Region 6 EPA employee that "standard [EPA] protocol" is to tell all "requestor[s] that they need to narrow their [FOIA] request because it is overbroad." *See* Exhibit 7 at 6.

26. Further, because EPA denied the States' FOIA request, EPA refused to act on Oklahoma's appeal of EPA's denial of the States' FOIA fee waiver request asserting that the appeal was moot. *See* Exhibit 6 at 3.

27. The EPA's May 31, 2013 denial letter constitutes the agency's final determination. *See* Exhibit 6 at 6. Plaintiff has therefore exhausted all administrative

remedies with EPA and now files this action for judicial review of EPA's determinations, which is proper pursuant to 5 U.S.C. 552(a)(4)(B).

PLAINTIFFS' CLAIMS FOR RELIEF

COUNT ONE
(Failure to Produce Records)

28. Plaintiff States re-allege and incorporate by reference all preceding paragraphs.

29. Defendant is unlawfully withholding records requested by Plaintiff pursuant to 5 U.S.C. § 552.

30. Plaintiff States properly asked for specific records within the custody and control of EPA. The States' FOIA request was not overbroad. The States' FOIA request stated with specificity the type of records sought in such a way that would "permit EPA employees to identify and locate" the requested records. U.S.C. § 552(a)(3), 40 C.F.R. § 2.102.

31. EPA violated FOIA's mandate to release agency records to the public by failing to release the records as the States specifically requested. U.S.C. §§ 552(a)(3)(A), 552(a)(3)(B).

COUNT TWO
(Improper Denial of Fee Waiver Request)

32. Plaintiff States re-allege and incorporate by reference all preceding paragraphs.

33. Plaintiff States have demonstrated they are entitled to a waiver of fees associated with processing their FOIA request because the information sought in the FOIA

request is in the public interest, will significantly contribute to the public's understanding of the operations and activities of EPA and will not be used to further any commercial interest. 5 U.S.C. § 552(a)(4)(A)(iii), 40 C.F.R. § 2.107(l).

34. EPA violated FOIA and its own regulations when it failed to grant the States' fee waiver request. U.S.C. § 552(a)(4)(A)(ii)-(iii), 40 C.F.R. § 2.107(1)(2) and (3).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff States respectfully requests that this Court:

1. Order Defendant to immediately process the States' FOIA request;

2. Order Defendant to conduct a thorough search for all responsive records;

3. Order Defendant to promptly disclose the requested records in their entirety and make copies available to the Plaintiff States;

4. Enjoin Defendant from charging the Plaintiff States fees for the processing of their requests;

5. Award Plaintiff States their costs and reasonable attorneys' fees incurred in this action under U.S.C. § 552(a)(4)(E); and

6. Grant such other relief as the Court may deem just and proper.

Date: July 16, 2013.

Respectfully submitted,

s/ E. Scott Pruitt
E. SCOTT PRUITT, OBA #15828
Oklahoma Attorney General
Tom Bates, OBA #15672
First Assistant Attorney General
Patrick R. Wyrick, OBA #21874
Oklahoma Solicitor General
P. Clayton Eubanks, OBA #16648
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Oklahoma City, OK 73105
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patrick.wyrick@oag.ok.gov
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Attorneys for Plaintiffs

On the Complaint:

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Counsel for Plaintiff the State of Alabama

s/ Thomas C. Horne
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James.Skardon@azag.gov

Counsel for Plaintiff the State of Arizona

s/ Sam Olens
SAM OLENS
Georgia Attorney General
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Counsel for Plaintiff the State of Wyoming

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

February 6, 2013

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

FREEDOM OF INFORMATION ACT REQUEST

Freedom of Information Officer
U.S. EPA, Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Hq.foia@epa.
FOIA REQUEST

Dear Sir or Madam:

This is a request under the Freedom of Information Act (5 U.S.C. § 552, as amended).

By this letter the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah and Wyoming ("**Requesting States**") are requesting any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2009, to the date of this letter that discuss or in any way relates to:

(a) any consideration, proposal or discussions with any Interested Organization (as that term is defined below), or any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy ("**Other Organizations**"), concerning:

i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act ("**CAA**"), 42 U.S.C. § 7604(a)(2);

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ii. the course of action to take with respect to any Regional Haze State Implementation Plan ("**SIP**") required to be submitted to the U.S. Environmental Protection Agency ("**EPA**") pursuant to CAA § 169A for any State;

iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP (the "**Subject**").

"**Interested Organizations**" is defined as any one of the following organizations:

- National Parks Conservation Association
- Montana Environmental Information Center
- Grand Canyon Trust
- Dine Citizens Against Ruining Our Environment
- Dakota Resource Council
- Dacotah Chapter of Sierra Club
- San Juan Citizens Alliance
- Our Children's Earth Foundation
- Plains Justice
- Powder River Basin Resource Council
- Sierra Club
- Environmental Defense Fund
- Wildearth Guardians
- Natural Resources Defense Council
- Western Resource Advocates
- Wyoming Outdoor Council
- Greater Yellowstone Coalition

(b) Copies of any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) sent or received by the following EPA offices:

i. the Office of the Administrator;
ii. the Office of Environmental Information;
iii. the Office of General Counsel;
iv. the Office of Inspector General;

v. the Office of International and Tribal Affairs;
vi. the Office of Research and Development;
vii. Region 1;
viii. Region 2;
ix. Region 3;
x. Region 4;
xi. Region 5;
xii. Region 6;
xiii. Region 7;
xiv. Region 8;
xv. Region 9; or
xvi. Region 10.

(including receipt by carbon copy or blind carbon copy), regarding the Subject including, but not limited to, documents sent by or received from individuals representing or employed by the Interested Organizations or Other Organizations.

Reason for FOIA Request

Over the past three years, the EPA has allowed its regulatory agenda to be largely defined by litigation settlements it has entered into with environmental organizations. Specifically, on at least forty-five occasions, EPA and other federal agencies have settled lawsuits (which included paying plaintiffs' attorneys' fees) brought under the CAA. These settlements take the form of binding Consent Decrees that dictate how and when EPA and other federal agencies must develop stringent new regulations. Unfortunately, States responsible for implementing many of these regulations have little knowledge of or input in this process, which is not consistent with the cooperative federalism structure of federal environmental law.

Out of the forty-five settlements that have been made public, EPA has paid almost $1 million in attorneys' fees to these groups, while also committing to develop a suite of sweeping new regulations. One EPA Consent Decree led to the promulgation of EPA's costliest regulation ever - the Mercury Air Toxics Standards (MATS). Other Consent Decrees include obligations that define how and when EPA acts on forty-five individual State Regional Haze SIPs – including the imposition of proposed federal implementation plans ("**FIPs**").

Many Consent Decrees authorize EPA to act in a way that is not consistent with current law. For example, Regional Haze Consent Decrees allowed EPA to propose combined Regional Haze SIPs/FIPs – something EPA has not done before in administering the CAA.

This is detrimental to the States and "unwinds" the State and federal partnership contained in the CAA.

States affected by these non-governmental organization lawsuits are not included as parties in the suits and when affected States try to intervene, EPA and the environmental groups frequently oppose State intervention. For instance, when the State of North Dakota sought to intervene in *Wildearth Guardians v. Jackson* in the U.S. District Court for the Northern District of California (where Wildearth Guardians filed its suit), EPA opposed the intervention despite the fact that the case involved how and when EPA should act on North Dakota's proposed Regional Haze SIP. *Wildearth Guardians v. Jackson*, No. C-09-2453-CW, 2011 U.S. Dist. LEXIS 14378 (N.D. Cal. Dec. 27, 2011) (order denying North Dakota's intervention).

State Attorneys General from the Requesting States are in the process of evaluating EPA's alarming practice of relying on Consent Decrees to deny the States their important role as a partner with EPA in implementing federal environmental law. Not only does EPA's action harm and jeopardize the States' role as a partner with EPA, but it harms the interests of the citizens of the Requesting States. Our citizens rely on and expect the States to implement federal environmental law. Often, these implementation efforts require the States to design plans to meet the individual circumstances of the State, while protecting and advancing the environmental goals and requirements of federal environmental law. When EPA coordinates with non-governmental organizations regarding how federal environmental law should be applied and implemented in an individual State and excludes the State from that effort the State and its citizens are harmed.

Rather than make individual FOIA requests, the Requesting States are making one request for the release of documents with the Interested Organizations and Other Organizations concerning the Subject. The Requesting States have lobbied, litigated, and publicly commented on federal actions which directly affect their individual State interests and those of their citizens. The requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States.

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA's operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

Fee Waiver Request

The Requesting States request that you waive any applicable fees since disclosure meets the standard for waiver of fees as it is in the public interest. *See* 40 C.F.R. § 2.107(l). Specifically, this request concerns "the operations or activities of the government;" disclosure is "likely to contribute" to an understanding of government operations or activities; disclosure will contribute to "public understanding;" the disclosure is likely to contribute "significantly" to public understanding of government operations and activities; and the States have no commercial interest in disclosure of the documents – the Requesting States' interest is to facilitate and promote the public interest. 40 C.F.R. § 2.107(2)(i),(iv).

Reasons for Granting the Fee Waiver Request

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA's operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

The Requesting States plan to make these documents available to the public at the University, Federal Depository and State Library systems ("**Library Systems**") in the respective Requesting States. As these facilities are open to the general public, many people will thereby have access to the information contained in the materials which are the subject of this request. Most, if not all, of these Libraries also serve as a Federal Depository. Federal Depository Libraries were "established by Congress to ensure that the American public has access to its Government's information." http://www.gpo.gov/libraries/. As Federal Depositories, these libraries ensure that the agency publications and other information "are highly visible to the public, promoted, and safeguarded." *Id.* Moreover, making available the requested Subject information and report at University Libraries will facilitate the teaching and research occurring at these Universities on important public policy issues including cooperative federalism and the State federal partnership. None of the requested Subject information or the resulting report will be used for commercial use or gain.

A. Legal Standard for Fee Waivers

FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI,* 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver test "should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver. *W. Watersheds Project v. Brown,* 318 F. Supp. 2d 1036, 1039 (D. Id. 2004). FOIA imposes a non-discretionary duty to provide documents without any charge if the disclosed information

satisfies a two-prong test established by statute. *Fed. CURE v. Lappin*, 602 F.Supp. 2d 197, 202 (D.D.C. 2009) (documents "*shall* be furnished without any charge" if two-prong test is satisfied (emphasis and omission in original)). First, the disclosed information must be likely to significantly contribute to public understanding of governmental operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii). Second, the disclosed information cannot be primarily in the commercial interests of the requester. *Id.*

EPA has promulgated regulations detailing the specific factors it considers when evaluating the two-prong statutory test for fee waiver requests. 40 C.F.R. § 2.107(*l*)(2)-(3). EPA's regulations elucidate further that to be granted fee waiver requests a requester must establish that the information requested for disclosure must pertain to and significantly contribute to the public understanding of governmental operations and activities. As this FOIA Request demonstrates, the Requesting States have clearly met all of the statutory and regulatory requirements necessary to be granted a fee waiver.

1. First Factor: The FOIA Request is for Records Concerning EPA's Operations and Activities.

The Subject information the Requesting States seek directly concerns the operations and activities of EPA. 40 C.F.R. § 2.107(*l*)(2)(i). Specifically, the FOIA Request seeks information directly related to EPA's operations and activities related to its implementation and enforcement of the CAA through negotiated settlements with non-governmental organizations. These settlements directly imposed standards upon and/or required the State to take certain actions under the federal environmental program at issue in the lawsuit or administrative action.

In its enforcement of these federal programs through settlements with non-governmental organizations, EPA is using public funds and resources. The Tenth Circuit held that a federal agency's expenditure of public funds and resources was an operation and activity of that agency satisfying the first factor of the public interest prong. *Forest Guardians*, 416 F.3d at 1178; *see also Edmonds Inst. v. DOI*, 460 F. Supp. 2d 63, 66-67 (D.D.C. 2006). Similarly, EPA has devoted public funds to paying attorneys' fees and devoted public resources to negotiating and enforcing the settlements. Clearly, the Requesting States meet the first factor as the requested Subject information concerns the "operations or activities of the government." 40 C.F.R. § 2.107(*l*)(2)(i).

2. Second Factor: The FOIA Request Seeks Meaningful Information That Contributes to an Increased Public Understanding about EPA's Operations or Activities Regarding the CAA and SIPs.

In considering whether to grant the Requesting States fee waiver request, EPA must determine whether the requested Subject information is meaningfully informative and likely to contribute to an increase in public understanding about those operations or activities. 40 C.F.R. § 2.107(*l*)(2)(ii). The Requesting States FOIA Request seeks information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest. How a federal agency interacts with non-governmental interests in the formation of policy has been identified as an "issue of the utmost importance." *NRDC v. United States EPA*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). And "an understanding of how [a federal agency] makes policy decisions, including the **influence of any outside groups on this process**, is also important to the public's understanding of the [government]. *Forest Guardians*, 416 F.3d at 1179-80. (emphasis added).

With the release of this meaningful information the Requesting States will use it to educate the public about how EPA has elected to resolve litigation and administrative actions which directly affect the formation of current and future federal environmental policy. In *Western Watersheds v. DOI*, the U.S. District Court determined the requesting party satisfied the second factor by requesting information that it would use to educate the public about an agency's decision-making and its intent to create a summary of such information that was reader-friendly. 318 F. Supp. 2d at 1040-41. The U.S. District Court for the District of Columbia reached the same result in *Federal CURE* in holding the requesting party's intent to analyze and synthesize the requested information into a report relayed to the public via email and internet satisfied the second factor of the public interest prong. 602 F. Supp. 2d at 202-03. As explained in this FOIA Request, the Requesting States will prepare a report summarizing the Subject information which will be made available to the general public through the States' websites and the Library Systems of the Requesting States.

3. Third Factor: The FOIA Request Seeks Information That Contributes to the Understanding of a Broad Audience of Persons Interested in EPA's Operations or Activities Regarding the CAA and SIPs.

To satisfy the third factor, the requesting party must show that the requested information contributes to the understanding of a broad audience of persons interested in the subject. 40 C.F.R. § 2.107(*l*)(2)(iii). In *Forest Guardians*, the Court held that the requesting party satisfied the third factor by demonstrating its intent to broadly disseminate the compiled information, which was only available in piecemeal and hard-to-access form. *Forest Guardians*, 416 F.3d at 1181-82. As in *Forest Guardians*, the Requesting States seek piecemeal information that is held in a number of EPA's regional or other offices throughout the nation and which information cannot be easily accessed. The requested information relates to EPA's communications and documentation in a large number of discrete lawsuits and enforcement actions. *Id.* (holding information in court houses,

newspaper articles, and affidavits not sufficient to justify denying a fee waiver). The Requesting States will then compile and summarize this information into an easily accessible and readable report for their citizens and distribute copies of the report to Congress and the media.

As detailed above, the Requesting States intend to disseminate the requested information by making the report as well as the underling information publicly available on the Requesting States' websites as well as through the Library Systems of each of the Requesting States. Because the report will be posted on State government websites any American with access to the internet will have access to the report. Accordingly, the report will be available to better inform **all** U.S. citizens on matters affecting EPA's operations and policy formation. *See Judicial Watch Inc. v. U.S. DOI*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000) (requesting party's concrete plan or specific intent for publication and other dissemination of requested information demonstrates compliance with third factor). Further, the Requesting States stature as representatives of their respective citizens and accountability to their citizens to provide information affecting each State's implementation of the CAA demonstrates that the Requesting States can and will disseminate the requested information to a broad group of interested persons. *See Fed. CURE*, 602 F. Supp. 2d at 204 (stature of largest public advocacy group demonstrated ability to disseminate information to reasonably broad group).

Finally, the Requesting States will use the report to educate State and federal lawmakers regarding the activities of EPA in negotiating settlements with non-governmental organizations that directly affect current and future federal environmental policy. The report will provide invaluable information to these lawmakers as they consider future changes to environmental programs that will affect all Americans.

4. Fourth Factor: The FOIA Request Seeks Information That will Significantly Enhance the Public's Understanding of EPA's Operations or Activities Regarding the CAA and SIPs.

The intention of FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," *NRDC* at 496 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The Requesting States are seeking the Subject information so as to significantly enhance the public's understanding of EPA's operations and activities and to ensure that the public has the information necessary to determine whether EPA's actions in entering into settlements with non-governmental organizations are prudent or thwart the cooperative federalism approach embodied in many of the federal environmental programs. 40 C.F.R. § 2.107(*l*)(2)(iv). Further, the public currently has no access to the requested Subject information. Only with disclosure of the requested Subject information will the public's understanding of EPA's operations and activities be greater than "as compared to

the level of public understanding existing prior to the disclosure." 40 C.F.R. § 2.107(*l*)(2)(iv).

As detailed above, the Requesting States intend to prepare a report on EPA's decision-making process in negotiating and entering into certain litigation settlements and how these settlements are affecting current and future environmental policy. In taking the Subject information, which is not in the public domain, compiling it, and disseminating it to the public in easily accessible forums, the Requesting States meet the fourth factor. *Fed. CURE*, 602 F. Supp. 2d at 204-05. Clearly, the "public's understanding of EPA decision making will be significantly enhanced by learning about the nature and scope of EPA communication[s]" and as such the Requesting States fee waiver request must be granted. *NRDC* at 501.

B. The Requesting States' FOIA Request Satisfies the Commercial-Interest Prong of the Fee Waiver Test.

In considering whether the second prong of the public interest fee waiver test is met, EPA considers the existence and magnitude of the requesting party's commercial interest in the requested information and whether the commercial interest outweighs the public interest. 40 C.F.R. § 2.107(*l*)(3). The Requesting States are exclusively comprised of State governments, which are noncommercial entities that have no commercial interest in the disclosure of information regarding the manner in which EPA operates. *See Fed. CURE*, 602 F. Supp. 2d at 201 (recognizing non-profit organization is a non-commercial entity entitled to fee waiver). The Requesting States' intended use of the requested Subject information is to make the information available—free of charge—to their respective citizens in a readable, summarized fashion. The States have no intention of using the information disclosed for financial gain. Nor does making the information available to the public create a commercial interest for the Requesting States. Further, the public interest in disclosure necessarily is greater in magnitude than that of the Requesting States' complete lack of commercial interest in the requested information. 40 C.F.R. § 2.107(*l*)(3)(ii). The Requesting States have no commercial interest in the information requested and therefore satisfy the second prong of the fee waiver test.

In light of the ongoing and contentious public policy controversy regarding EPA's coordination and planning its regulatory agenda with non-governmental organizations, the Requesting States note that time is of the essence in this matter. There is a great need for prompt disclosure so that the released information may more adequately inform public understanding and discussion of EPA's actions.

In the event that access to any of the requested records is denied, please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We therefore request that the Requesting States be provided with all

non-exempt portions which are reasonably segregable. We further request that you describe the deleted material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies in this instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination, and in formulating arguments in case an appeal is taken. The EPA's written justification might also help to avoid unnecessary litigation. We of course reserve the right to appeal the withholding or deletion of any information and expect that you will list the office and address were such an appeal can be sent.

If for some reason, the fee waiver request is denied, while reserving my right to appeal such a decision, the Requesting States are willing to pay $5.00 (five dollars) to cover costs of document search and duplication.

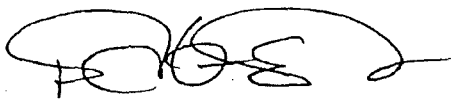
Access to the requested records should be granted within twenty (20) working days from the date of your receipt. Failure to respond in a timely manner shall be viewed as a denial of this request and the requesters may immediately file an administrative appeal.

Finally, the Requesting States ask that all correspondence regarding this FOIA request and all documents produced in response to this request be directed to the Attorney General of the State of Oklahoma.

Thanking you in advance for your prompt reply.

Sincerely,

E. Scott Pruitt
OKLAHOMA ATTORNEY GENERAL



P. Clayton Eubanks
DEPUTY SOLICITOR GENERAL
Office of Oklahoma Attorney General
(405) 522-8992 Fax (405) 522-0608
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

February 22, 2013

OFFICE OF
ENVIRONMENTAL INFORMATION

Mr. P. Clayton Eubanks
Deputy Solicitor General
Office of Oklahoma Attorney General
313 N. E. 21st Street
Oklahoma City, OK 73105

RE: Request Number EPA-HQ-2013-003886

Dear Mr. Eubanks:

This is in response to your request for a waiver of fees in connection with your Freedom of Information Act (FOIA) request to the U.S. Environmental Protection Agency (EPA) seeking a copy of records from the January 1, 2009 to February 6, 2013 regarding the scope and application of the non-discretionary duty to take certain action under the Clear Air Act; the course of action to take with respect to any Regional Haze State Implementation Plan; and other records as described in your request.

We have reviewed your fee waiver justification and based on the information provided, we are denying your request for a fee waiver. You have not expressed a specific intent to disseminate the information to the general public. As a result of you failing to meet the above criteria, accordingly, there is no need to address the remaining prongs of the fee waiver criteria. If the estimated cost exceeds $25.00 the Office of Air and Radiation will contact you regarding the cost of processing your request and seek an assurance of payment. They will be unable to process your request until they receive your written assurance of payment.

Under the FOIA, you have the right to appeal this determination to the National Freedom of Information Office, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, NW (2822T), Washington, DC 20460 (U.S. Postal Service Only), E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania

EXHIBIT
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Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, NW, Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI number listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Should you choose to appeal this determination, please be sure to fully address all factors required by EPA's FOIA Regulations, located at 40 C.F.R. § 2.107(l) in your appeal. If you have any questions concerning this determination please contact me at (202) 566-1667.

Sincerely,

Larry F. Gottesman
National FOIA Officer

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

March 15, 2013

VIA US CERTIFIED MAIL
RETURN RECEIPT REQUESTED,
FACSIMILE & E-MAIL

National Freedom of Information Officer
United States EPA
FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Fax: 202-566-2147
Email: Hq.foia@epa

Re: FREEDOM OF INFORMATION ACT APPEAL
Appeal of Fee Waiver Denial Pursuant to 40 C.F.R. § 2.104(j)
FOIA Request No. EPA-HQ-2013-003886

Dear Sir or Madam:

This is a timely appeal of the U.S. Environmental Protection Agency's ("**EPA**") improper denial of the Oklahoma Attorney General's request for a fee waiver in connection with the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah and Wyoming's ("**Requesting States**") February 6, 2013, Freedom of Information Act ("**FOIA**") request No. EPA-HQ-2013-003886. ("**FOIA Request**"). For the reasons stated in the FOIA Request, the Requesting States ask that this appeal be given expedited review.

I. BACKGROUND

As detailed in the FOIA Request, the Requesting States seek any and all documents regarding any consideration, proposal or discussions between the EPA Administrator with any Interested Organization or Other Organizations[1] concerning:

i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act ("**CAA**"), 42 U.S.C. § 7604(a)(2);

[1] Interested Organization and Other Organizations are defined in the Requesting States FOIA Request.

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EXHIBIT 3

ii. the course of action to take with respect to any Regional Haze State Implementation Plan ("**SIP**") required to be submitted to the U.S. Environmental Protection Agency ("**EPA**") pursuant to CAA § 169A for any State;

iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP (the "**Subject**").

A copy of the FOIA Request is attached hereto and incorporated by reference as Attachment A.

In its February 22, 2013 denial letter, EPA claims that the Requesting States' fee waiver request must be denied because "you have not expressed a **specific intent** to disseminate the information to the general public." A copy of EPA's Fee Waiver Denial is attached hereto and incorporated by reference as Attachment B. Respectfully, EPA asserted basis for denial of the Requesting States' fee waiver request is wholly without merit. In their FOIA Request the Requesting States make numerous statements that the documents requested from EPA will be disseminated to the general public.

- "The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report...The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues." FOIA Request at p. 5.

- "The Requesting States plan to make [the EPA] documents available to the public at the University, Federal Depository and State Library systems [ ] in the respective Requesting States. As these facilities are open to the **general public**, many people will thereby have access to the information contained in the materials which are the subject of this request." (emphasis added). FOIA Request at p. 5.

Because the information sought in the FOIA Request is in the public interest, will significantly contribute to the public's understanding of the operations and activities of EPA and will not be used to further any commercial interest, the Requesting States properly sought a fee waiver pursuant to 40 C.F.R. § 2.107(*l*). *See also generally* 5 U.S.C. § 552(a)(4)(A)(iii).

As set forth below, EPA's denial of the Requesting States' fee waiver request is factually incorrect and legally contrary to FOIA, EPA's own regulations, and case law interpreting and applying fee waiver regulations. Accordingly, the Requesting States request the immediate reversal of EPA's denial of the fee waiver request and that EPA be instructed to proceed forthwith in processing the FOIA Request.

II. THE REQUESTING STATES ARE ENTITLED TO A FEE WAIVER FOR THE FOIA REQUEST

A. The Requesting States' Purpose And Intent For The Requested Information

Over the past three years EPA has allowed its regulatory and policy agenda to be largely defined by litigation settlements it has entered into with non-governmental organizations. On at least forty-five occasions, EPA and other federal agencies have settled lawsuits (which included the payment of plaintiffs' attorneys' fees) brought under the CAA and other environmental statutory programs. These settlements take the form of binding Consent Decrees that dictate how and when EPA and other federal agencies must develop stringent new regulations or whether to approve certain permit applications. Unfortunately, States responsible for implementing many of these regulations and permit programs have little knowledge of or input in the litigation or settlement process.

The effective exclusion of the States from these litigation or administrative proceedings is directly inconsistent with the cooperative federalism approach to implementing many of the environmental programs created under the CAA. In implementing these federal environmental programs, States often must design plans that meet the individual circumstances of the State, while protecting and advancing the environmental goals and requirements of federal environmental law. However, these State efforts and plans are effectively superseded when EPA enters into negotiated settlements with non-governmental organizations alone that dictate how federal environmental law should be applied and implemented in an individual State. When the States' important role as a partner with EPA in implementing federal environmental programs is ignored, the States and their important sovereign interests are impaired, as are the rights of their citizens who rely on and expect the States to implement the federal environmental laws—not EPA along with non-governmental organizations.

The Requesting States seek the Subject information so that they may: understand and make public EPA's decision-making process in negotiating and entering into litigation settlements; utilize the Subject information to inform the preparation and participation in the public comment process on negotiated settlements between EPA and non-governmental organizations; utilize the Subject information to determine the extent to which the cooperative federalism principles embodied in the environmental programs, such as the CAA, are being eroded by these negotiated settlements; and use the Subject information to inform and educate the general public, and State and federal lawmakers on the importance of cooperative federalism and why the States should continue to have the lead role in implementing federal environmental programs.

As fully explained in the FOIA Request, the Requesting States will analyze the information presented in the released documents and our staff of experts will produce a report as

part of our review of EPA's operations. The report **will be disseminated to the general public by being posted on State government websites as well as to the media and all members of Congress**. Further, the underlying Subject information and the report will be made available to the public at the University, Federal Depository and State Library systems ("**Library System**") in the respective Requesting States. With the posting of the report on the States' websites and making the report available in the Library System, millions of people throughout the United States will have access to the Subject information and resulting report.

Additionally, most, if not all, of these Libraries also serve as a Federal Depository. Federal Depository Libraries were "established by Congress to ensure that the American public has access to its Government's information." http://www.gpo.gov/libraries/. As Federal Depositories, these libraries ensure that the agency publications and other information "are highly visible to the public, promoted, and safeguarded." *Id.* Moreover, making available the requested Subject information and report at University Libraries will facilitate the teaching and research occurring at these Universities on important public policy issues including cooperative federalism and the State federal partnership. None of the requested Subject information or the resulting report will be used for commercial use or gain.

B. Legal Standard for Fee Waivers

FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver test "should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver. *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1039 (D. Id. 2004). FOIA imposes a non-discretionary duty to provide documents without any charge if the disclosed information satisfies a two-prong test established by statute. *Fed. CURE v. Lappin*, 602 F.Supp. 2d 197, 202 (D.D.C. 2009) (documents "*shall* be furnished without any charge" if two-prong test is satisfied (emphasis and omission in original)). First, the disclosed information must be likely to significantly contribute to public understanding of governmental operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii). Second, the disclosed information cannot be primarily in the commercial interests of the requester. *Id.*

EPA has promulgated regulations detailing the specific factors it considers when evaluating the two-prong statutory test for fee waiver requests. 40 C.F.R. § 2.107(*l*)(2)-(3). EPA's regulations elucidate further that to be granted fee waiver requests it must be established that the information requested for disclosure must pertain to and significantly contribute to the public understanding of governmental operations and activities. As the FOIA Request demonstrates and this appeal further explains, the Requesting States have clearly met all of the statutory and regulatory requirements necessary to be granted a fee waiver.

1. First Factor: The FOIA Request is for Records Concerning EPA's Operations and Activities.

As detailed in the FOIA Request, the Subject information the Requesting States seek disclosure of directly concerns the operations and activities of EPA. 40 C.F.R. § 2.107(*l*)(2)(i). Specifically, the FOIA Request seeks information directly related to EPA's operations and activities related to its implementation and enforcement of the CAA's Regional Haze program through negotiated settlements with non-governmental organizations. These settlements directly imposed standards upon and/or required the State to take certain actions under the CAA.

In its enforcement of the CAA through settlements with non-governmental organizations, EPA is using public funds and resources. The Tenth Circuit held that a federal agency's expenditure of public funds and resources was an operation and activity of that agency satisfying the first factor of the public interest prong. *Forest Guardians*, 416 F.3d at 1178; *see also Edmonds Inst. v. DOI*, 460 F. Supp. 2d 63, 66-67 (D.D.C. 2006). Similarly, EPA has devoted public funds to paying attorneys' fees and devoted public resources to negotiating and enforcing the settlements. Clearly, the Requesting States meet the first factor as the requested Subject information concerns the "operations or activities of the government." 40 C.F.R. § 2.107(*l*)(2)(i).

2. Second Factor: The FOIA Request Seeks Meaningful Information That Contributes to an Increased Public Understanding about EPA's Operations or Activities Regarding the CAA and SIPs.

In considering whether to grant the Requesting States fee waiver request, EPA must determine whether the requested Subject information is meaningfully informative and likely to contribute to an increase in public understanding about those operations or activities. 40 C.F.R. § 2.107(*l*)(2)(ii). The Requesting States FOIA Request seeks information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest. How a federal agency interacts with non-governmental interests in the formation of policy has been identified as an "issue of the utmost importance." *NRDC v. United States EPA*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). And "an understanding of how [a federal agency] makes policy decisions, including the **influence of any outside groups on this process**, is also important to the public's understanding of the [government]. *Forest Guardians*, 416 F.3d at 1179-80. (emphasis added).

With the release of this meaningful information the Requesting States will use it to educate the public about how EPA has elected to resolve litigation and administrative actions which directly affect the formation of current and future federal environmental policy. In *Western Watersheds v. DOI*, the U.S. District Court determined the requesting party satisfied the second factor by requesting information that it would use to educate the public about an agency's decision-making and its intent to create a summary of such information that was reader-friendly. 318 F. Supp. 2d at 1040-41. The U.S. District Court for the District of Columbia reached the same result in *Federal CURE* in holding the requesting party's intent to analyze and synthesize

the requested information into a report relayed to the public via email and internet satisfied the second factor of the public interest prong. 602 F. Supp. 2d at 202-03. As explained in its FOIA Request, the Requesting States will prepare a report summarizing the Subject information which will be made available to the general public through the States' websites and the Library Systems of the Requesting States.

3.Third Factor: The FOIA Request Seeks Information That Contributes to the Understanding of a Broad Audience of Persons Interested in EPA's Operations or Activities Regarding the CAA and SIPs.

To satisfy the third factor, the requesting party must show that the requested information contributes to the understanding of a broad audience of persons interested in the subject. 40 C.F.R. § 2.107(*l*)(2)(iii). In *Forest Guardians*, the Court held that the requesting party satisfied the third factor by demonstrating its intent to broadly disseminate the compiled information, which was only available in piecemeal and hard-to-access form. *Forest Guardians*, 416 F.3d at 1181-82. As in *Forest Guardians*, the Requesting States seek piecemeal information that is held in a number of EPA's regional or other offices throughout the nation and which information cannot be easily accessed. The requested information relates to EPA's communications and documentation in a number of discrete administrative proceedings and lawsuits. *Id.* (holding information in court houses, newspaper articles, and affidavits not sufficient to justify denying a fee waiver). The Requesting States will then compile and summarize this information into an easily accessible and readable report for their citizens and distribute copies of the report to the general public, Congress and the media.

As detailed above, the Requesting States will disseminate the requested information to the general public by making the report as well as the underling information publicly available on the Requesting States' websites as well as through the Library Systems of each of the Requesting States. Because the report will be posted on State government websites any American with access to the internet will have access to the report. Accordingly, the report will be available to better inform **all** U.S. citizens on matters affecting EPA's operations and policy formation. *See Judicial Watch Inc. v. U.S. DOI*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000) (requesting party's concrete plan or specific intent for publication and other dissemination of requested information demonstrates compliance with third factor). Further, the Requesting States stature as representatives of their respective citizens and accountability to their citizens to provide information affecting each State's implementation of the CAA demonstrates that the Requesting States can and will disseminate the requested information to a broad group of interested persons. *See Fed. CURE*, 602 F. Supp. 2d at 204 (stature of largest public advocacy group demonstrated ability to disseminate information to reasonably broad group).

Finally, the Requesting States will use the report to educate State and federal lawmakers regarding the activities of EPA in negotiating settlements with non-governmental organizations that directly affect current and future federal environmental policy. The report will provide

invaluable information to these lawmakers as they consider future changes to environmental programs that will affect all Americans.

4. Fourth Factor: The FOIA Request Seeks Information That Will Significantly Enhance the Public's Understanding of EPA's Operations or Activities Regarding the CAA and SIPs.

The intention of FOIA is to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," *NRDC* at 496 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). The Requesting States are seeking the Subject information so as to significantly enhance the public's understanding of EPA's operations and activities and to ensure that the public has the information necessary to determine whether EPA's actions in entering into settlements with non-governmental organizations are prudent or thwart the cooperative federalism approach embodied in the CAA. 40 C.F.R. § 2.107(*l*)(2)(iv). Further, the public currently has no access to the requested Subject information. Only with disclosure of the requested Subject information will the public's understanding of EPA's operations and activities be greater than "as compared to the level of public understanding existing prior to the disclosure." 40 C.F.R. § 2.107(*l*)(2)(iv).

As detailed above, the Requesting States will prepare a report on EPA's decision-making process in negotiating and entering into certain litigation settlements and how these settlements are affecting current and future environmental policy. In taking the Subject information, which is not in the public domain, compiling it, and disseminating it to the public in easily accessible forums, the Requesting States meet the fourth factor. *Fed. CURE*, 602 F. Supp. 2d at 204-05. Clearly, the "public's understanding of EPA decision-making will be significantly enhanced by learning about the nature and scope of EPA communication[s]" and as such the Requesting States fee waiver request must be granted. *NRDC* at 501.

C. The Requesting States' FOIA Request Satisfies the Commercial-Interest Prong of the Fee Waiver Test.

In considering whether the second prong of the public interest fee waiver test is met, EPA considers the existence and magnitude of the requesting party's commercial interest in the requested information and whether the commercial interest outweighs the public interest. 40 C.F.R. § 2.107(*l*)(3). The Requesting States are exclusively comprised of State governments, which are noncommercial entities that have no commercial interest in the disclosure of information regarding the manner in which EPA operates. *See Fed. CURE*, 602 F. Supp. 2d at 201 (recognizing non-profit organization is a non-commercial entity entitled to fee waiver). The Requesting States' use of the requested Subject information is to make the information available—free of charge—to their respective citizens in a readable, summarized fashion. The States have no intention of using the information disclosed for financial gain. Nor does making the information available to the public create a commercial interest for the Requesting States. Further, the public interest in disclosure necessarily is greater in magnitude than that of the

Requesting States' complete lack of commercial interest in the requested information. 40 C.F.R. § 2.107(*l*)(3)(ii). The Requesting States have no commercial interest in the information requested and therefore satisfy the second prong of the fee waiver test.

III. CONCLUSION

The Requesting States are entitled to a fee waiver because the information sought will benefit the public's understanding as to how environmental laws are being manipulated to usurp the authority of States via Consent Decrees between EPA and non-governmental organizations—negotiations that leave the affected State or States entirely out of the process. The impact of these EPA settlements on current and future environmental policy is significant and impacts all Americans who are either directly or indirectly affected by EPA regulation and policy. Further, the Requesting States are making the Subject information available to the public and receive absolutely no financial benefit from the information. As such, the Requesting States respectfully request that EPA's fee waiver denial be reversed and that all fees related to responding to the FOIA Request be waived, and that EPA respond to the Requesting States' FOIA Request.

Sincerely,

P. Clayton Eubanks
Deputy Solicitor General

PCE:esn
Attachments

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

February 6, 2013

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

FREEDOM OF INFORMATION ACT REQUEST

Freedom of Information Officer
U.S. EPA, Records, FOIA and Privacy Branch
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
Hq.foia@epa.
FOIA REQUEST

Dear Sir or Madam:

This is a request under the Freedom of Information Act (5 U.S.C. § 552, as amended).

By this letter the States of Alabama, Arizona, Georgia, Kansas, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, Texas, Utah and Wyoming ("**Requesting States**") are requesting any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2009, to the date of this letter that discuss or in any way relates to:

(a) any consideration, proposal or discussions with any Interested Organization (as that term is defined below), or any other non-governmental organization, including citizen organizations, whose purpose or interest may include environmental or natural resource advocacy and policy ("**Other Organizations**"), concerning:

i. the scope and application of the EPA Administrator's non-discretionary duty to take certain actions under the Clean Air Act ("**CAA**"), 42 U.S.C. § 7604(a)(2);

ATTACHMENT "A"

313 N.E. 21ST STREET • OKLAHOMA CITY, OK 73105 • (405) 521-3921 • FAX: (405) 521-6246

ii. the course of action to take with respect to any Regional Haze State Implementation Plan ("**SIP**") required to be submitted to the U.S. Environmental Protection Agency ("**EPA**") pursuant to CAA § 169A for any State;

iii. the course of action to be taken with respect to any administrative or judicial order, decree or waiver entered, or proposed to be entered concerning any Regional Haze SIP (the "**Subject**").

"**Interested Organizations**" is defined as any one of the following organizations:

- National Parks Conservation Association
- Montana Environmental Information Center
- Grand Canyon Trust
- Dine Citizens Against Ruining Our Environment
- Dakota Resource Council
- Dacotah Chapter of Sierra Club
- San Juan Citizens Alliance
- Our Children's Earth Foundation
- Plains Justice
- Powder River Basin Resource Council
- Sierra Club
- Environmental Defense Fund
- Wildearth Guardians
- Natural Resources Defense Council
- Western Resource Advocates
- Wyoming Outdoor Council
- Greater Yellowstone Coalition

(b) Copies of any and all documents (including any and all written or electronic correspondence, audiotapes, electronic records, videotapes, photographs, telephone messages, voice mail messages, e-mails, facsimiles, daily agendas and calendars, information about meetings and/or discussions, whether in-person or over the telephone, agendas, minutes and a list of participants for those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) sent or received by the following EPA offices:

i. the Office of the Administrator;
ii. the Office of Environmental Information;
iii. the Office of General Counsel;
iv. the Office of Inspector General;

v. the Office of International and Tribal Affairs;
vi. the Office of Research and Development;
vii. Region 1;
viii. Region 2;
ix. Region 3;
x. Region 4;
xi. Region 5;
xii. Region 6;
xiii. Region 7;
xiv. Region 8;
xv. Region 9; or
xvi. Region 10.

(including receipt by carbon copy or blind carbon copy), regarding the Subject including, but not limited to, documents sent by or received from individuals representing or employed by the Interested Organizations or Other Organizations.

Reason for FOIA Request

Over the past three years, the EPA has allowed its regulatory agenda to be largely defined by litigation settlements it has entered into with environmental organizations. Specifically, on at least forty-five occasions, EPA and other federal agencies have settled lawsuits (which included paying plaintiffs' attorneys' fees) brought under the CAA. These settlements take the form of binding Consent Decrees that dictate how and when EPA and other federal agencies must develop stringent new regulations. Unfortunately, States responsible for implementing many of these regulations have little knowledge of or input in this process, which is not consistent with the cooperative federalism structure of federal environmental law.

Out of the forty-five settlements that have been made public, EPA has paid almost $1 million in attorneys' fees to these groups, while also committing to develop a suite of sweeping new regulations. One EPA Consent Decree led to the promulgation of EPA's costliest regulation ever - the Mercury Air Toxics Standards (MATS). Other Consent Decrees include obligations that define how and when EPA acts on forty-five individual State Regional Haze SIPs – including the imposition of proposed federal implementation plans ("**FIPs**").

Many Consent Decrees authorize EPA to act in a way that is not consistent with current law. For example, Regional Haze Consent Decrees allowed EPA to propose combined Regional Haze SIPs/FIPs – something EPA has not done before in administering the CAA.

This is detrimental to the States and "unwinds" the State and federal partnership contained in the CAA.

States affected by these non-governmental organization lawsuits are not included as parties in the suits and when affected States try to intervene, EPA and the environmental groups frequently oppose State intervention. For instance, when the State of North Dakota sought to intervene in *Wildearth Guardians v. Jackson* in the U.S. District Court for the Northern District of California (where Wildearth Guardians filed its suit), EPA opposed the intervention despite the fact that the case involved how and when EPA should act on North Dakota's proposed Regional Haze SIP. *Wildearth Guardians v. Jackson*, No. C-09-2453-CW, 2011 U.S. Dist. LEXIS 14378 (N.D. Cal. Dec. 27, 2011) (order denying North Dakota's intervention).

State Attorneys General from the Requesting States are in the process of evaluating EPA's alarming practice of relying on Consent Decrees to deny the States their important role as a partner with EPA in implementing federal environmental law. Not only does EPA's action harm and jeopardize the States' role as a partner with EPA, but it harms the interests of the citizens of the Requesting States. Our citizens rely on and expect the States to implement federal environmental law. Often, these implementation efforts require the States to design plans to meet the individual circumstances of the State, while protecting and advancing the environmental goals and requirements of federal environmental law. When EPA coordinates with non-governmental organizations regarding how federal environmental law should be applied and implemented in an individual State and excludes the State from that effort the State and its citizens are harmed.

Rather than make individual FOIA requests, the Requesting States are making one request for the release of documents with the Interested Organizations and Other Organizations concerning the Subject. The Requesting States have lobbied, litigated, and publicly commented on federal actions which directly affect their individual State interests and those of their citizens. The requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States.

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA's operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

Fee Waiver Request

The Requesting States request that you waive any applicable fees since disclosure meets the standard for waiver of fees as it is in the public interest. *See* 40 C.F.R. § 2.107(l). Specifically, this request concerns "the operations or activities of the government;" disclosure is "likely to contribute" to an understanding of government operations or activities; disclosure will contribute to "public understanding;" the disclosure is likely to contribute "significantly" to public understanding of government operations and activities; and the States have no commercial interest in disclosure of the documents – the Requesting States' interest is to facilitate and promote the public interest. 40 C.F.R. § 2.107(2)(i),(iv).

Reasons for Granting the Fee Waiver Request

The Requesting States will analyze the data presented in the released documents and our staff of experts will produce a report as part of our ongoing review of EPA's operations. The report will be disseminated to others in our States as well as disseminated to the media and Congress as a component of our active involvement in State efforts addressing environmental issues.

The Requesting States plan to make these documents available to the public at the University, Federal Depository and State Library systems ("**Library Systems**") in the respective Requesting States. As these facilities are open to the general public, many people will thereby have access to the information contained in the materials which are the subject of this request. Most, if not all, of these Libraries also serve as a Federal Depository. Federal Depository Libraries were "established by Congress to ensure that the American public has access to its Government's information." http://www.gpo.gov/libraries/. As Federal Depositories, these libraries ensure that the agency publications and other information "are highly visible to the public, promoted, and safeguarded." *Id.* Moreover, making available the requested Subject information and report at University Libraries will facilitate the teaching and research occurring at these Universities on important public policy issues including cooperative federalism and the State federal partnership. None of the requested Subject information or the resulting report will be used for commercial use or gain.

A. Legal Standard for Fee Waivers

FOIA's fee waiver provision is to be liberally construed in favor of waivers for noncommercial requesters. *Forest Guardians v. DOI*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver test "should not be interpreted to allow federal agencies to set up roadblocks to prevent noncommercial entities from receiving a fee waiver. *W. Watersheds Project v. Brown*, 318 F. Supp. 2d 1036, 1039 (D. Id. 2004). FOIA imposes a non-discretionary duty to provide documents without any charge if the disclosed information

satisfies a two-prong test established by statute. *Fed. CURE v. Lappin*, 602 F.Supp. 2d 197, 202 (D.D.C. 2009) (documents "*shall* be furnished without any charge" if two-prong test is satisfied (emphasis and omission in original)). First, the disclosed information must be likely to significantly contribute to public understanding of governmental operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii). Second, the disclosed information cannot be primarily in the commercial interests of the requester. *Id.*

EPA has promulgated regulations detailing the specific factors it considers when evaluating the two-prong statutory test for fee waiver requests. 40 C.F.R. § 2.107(*l*)(2)-(3). EPA's regulations elucidate further that to be granted fee waiver requests a requester must establish that the information requested for disclosure must pertain to and significantly contribute to the public understanding of governmental operations and activities. As this FOIA Request demonstrates, the Requesting States have clearly met all of the statutory and regulatory requirements necessary to be granted a fee waiver.

1. First Factor: The FOIA Request is for Records Concerning EPA's Operations and Activities.

The Subject information the Requesting States seek directly concerns the operations and activities of EPA. 40 C.F.R. § 2.107(*l*)(2)(i). Specifically, the FOIA Request seeks information directly related to EPA's operations and activities related to its implementation and enforcement of the CAA through negotiated settlements with non-governmental organizations. These settlements directly imposed standards upon and/or required the State to take certain actions under the federal environmental program at issue in the lawsuit or administrative action.

In its enforcement of these federal programs through settlements with non-governmental organizations, EPA is using public funds and resources. The Tenth Circuit held that a federal agency's expenditure of public funds and resources was an operation and activity of that agency satisfying the first factor of the public interest prong. *Forest Guardians*, 416 F.3d at 1178; *see also Edmonds Inst. v. DOI*, 460 F. Supp. 2d 63, 66-67 (D.D.C. 2006). Similarly, EPA has devoted public funds to paying attorneys' fees and devoted public resources to negotiating and enforcing the settlements. Clearly, the Requesting States meet the first factor as the requested Subject information concerns the "operations or activities of the government." 40 C.F.R. § 2.107(*l*)(2)(i).

2. Second Factor: The FOIA Request Seeks Meaningful Information That Contributes to an Increased Public Understanding about EPA's Operations or Activities Regarding the CAA and SIPs.

In considering whether to grant the Requesting States fee waiver request, EPA must determine whether the requested Subject information is meaningfully informative and likely to contribute to an increase in public understanding about those operations or activities. 40 C.F.R. § 2.107(*l*)(2)(ii). The Requesting States FOIA Request seeks information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest. How a federal agency interacts with non-governmental interests in the formation of policy has been identified as an "issue of the utmost importance." *NRDC v. United States EPA*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008). And "an understanding of how [a federal agency] makes policy decisions, including the **influence of any outside groups on this process**, is also important to the public's understanding of the [government]. *Forest Guardians*, 416 F.3d at 1179-80. (emphasis added).

With the release of this meaningful information the Requesting States will use it to educate the public about how EPA has elected to resolve litigation and administrative actions which directly affect the formation of current and future federal environmental policy. In *Western Watersheds v. DOI*, the U.S. District Court determined the requesting party satisfied the second factor by requesting information that it would use to educate the public about an agency's decision-making and its intent to create a summary of such information that was reader-friendly. 318 F. Supp. 2d at 1040-41. The U.S. District Court for the District of Columbia reached the same result in *Federal CURE* in holding the requesting party's intent to analyze and synthesize the requested information into a report relayed to the public via email and internet satisfied the second factor of the public interest prong. 602 F. Supp. 2d at 202-03. As explained in this FOIA Request, the Requesting States will prepare a report summarizing the Subject information which will be made available to the general public through the States' websites and the Library Systems of the Requesting States.

3. Third Factor: The FOIA Request Seeks Information That Contributes to the Understanding of a Broad Audience of Persons Interested in EPA's Operations or Activities Regarding the CAA and SIPs.

To satisfy the third factor, the requesting party must show that the requested information contributes to the understanding of a broad audience of persons interested in the subject. 40 C.F.R. § 2.107(*l*)(2)(iii). In *Forest Guardians*, the Court held that the requesting party satisfied the third factor by demonstrating its intent to broadly disseminate the compiled information, which was only available in piecemeal and hard-to-access form. *Forest Guardians*, 416 F.3d at 1181-82. As in *Forest Guardians*, the Requesting States seek piecemeal information that is held in a number of EPA's regional or other offices throughout the nation and which information cannot be easily accessed. The requested information relates to EPA's communications and documentation in a large number of discrete lawsuits and enforcement actions. *Id.* (holding information in court houses,

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the level of public understanding existing prior to the disclosure." 40 C.F.R. § 2.107(*l*)(2)(iv).

As detailed above, the Requesting States intend to prepare a report on EPA's decision-making process in negotiating and entering into certain litigation settlements and how these settlements are affecting current and future environmental policy. In taking the Subject information, which is not in the public domain, compiling it, and disseminating it to the public in easily accessible forums, the Requesting States meet the fourth factor. *Fed. CURE*, 602 F. Supp. 2d at 204-05. Clearly, the "public's understanding of EPA decision making will be significantly enhanced by learning about the nature and scope of EPA communication[s]" and as such the Requesting States fee waiver request must be granted. *NRDC* at 501.

B. The Requesting States' FOIA Request Satisfies the Commercial-Interest Prong of the Fee Waiver Test.

In considering whether the second prong of the public interest fee waiver test is met, EPA considers the existence and magnitude of the requesting party's commercial interest in the requested information and whether the commercial interest outweighs the public interest. 40 C.F.R. § 2.107(*l*)(3). The Requesting States are exclusively comprised of State governments, which are noncommercial entities that have no commercial interest in the disclosure of information regarding the manner in which EPA operates. *See Fed. CURE*, 602 F. Supp. 2d at 201 (recognizing non-profit organization is a non-commercial entity entitled to fee waiver). The Requesting States' intended use of the requested Subject information is to make the information available—free of charge—to their respective citizens in a readable, summarized fashion. The States have no intention of using the information disclosed for financial gain. Nor does making the information available to the public create a commercial interest for the Requesting States. Further, the public interest in disclosure necessarily is greater in magnitude than that of the Requesting States' complete lack of commercial interest in the requested information. 40 C.F.R. § 2.107(*l*)(3)(ii). The Requesting States have no commercial interest in the information requested and therefore satisfy the second prong of the fee waiver test.

In light of the ongoing and contentious public policy controversy regarding EPA's coordination and planning its regulatory agenda with non-governmental organizations, the Requesting States note that time is of the essence in this matter. There is a great need for prompt disclosure so that the released information may more adequately inform public understanding and discussion of EPA's actions.

In the event that access to any of the requested records is denied, please note that the FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. We therefore request that the Requesting States be provided with all

non-exempt portions which are reasonably segregable. We further request that you describe the deleted material in detail and specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies in this instance. Please separately state your reasons for not invoking your discretionary powers to release the requested documents in the public interest. Such statements will be helpful in deciding whether to appeal an adverse determination, and in formulating arguments in case an appeal is taken. The EPA's written justification might also help to avoid unnecessary litigation. We of course reserve the right to appeal the withholding or deletion of any information and expect that you will list the office and address were such an appeal can be sent.

If for some reason, the fee waiver request is denied, while reserving my right to appeal such a decision, the Requesting States are willing to pay $5.00 (five dollars) to cover costs of document search and duplication.

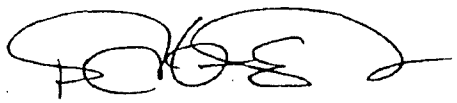
Access to the requested records should be granted within twenty (20) working days from the date of your receipt. Failure to respond in a timely manner shall be viewed as a denial of this request and the requesters may immediately file an administrative appeal.

Finally, the Requesting States ask that all correspondence regarding this FOIA request and all documents produced in response to this request be directed to the Attorney General of the State of Oklahoma.

Thanking you in advance for your prompt reply.

Sincerely,

E. Scott Pruitt
OKLAHOMA ATTORNEY GENERAL



P. Clayton Eubanks
DEPUTY SOLICITOR GENERAL
Office of Oklahoma Attorney General
(405) 522-8992 Fax (405) 522-0608
clayton.eubanks@oag.ok.gov

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Freedom Info Officer
US EPA Rec, FOIA
1200 Pennsylvania, NW
Washington, DC (2822T)
20460

COMPLETE THIS SECTION ON DELIVERY

A. Received by *(Please Print Clearly)* B. Date of Delivery

C. Signature

X 2/6/13 ☐ Agent ☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number
(Transfer from service label) 91 7199 9991 7032 0592 1186

PS Form 3811, March 2001 Domestic Return Receipt 102595-01-M-142

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

February 22, 2013

OFFICE OF
ENVIRONMENTAL INFORMATION

Mr. P. Clayton Eubanks
Deputy Solicitor General
Office of Oklahoma Attorney General
313 N. E. 21st Street
Oklahoma City, OK 73105

RE: Request Number EPA-HQ-2013-003886

Dear Mr. Eubanks:

This is in response to your request for a waiver of fees in connection with your Freedom of Information Act (FOIA) request to the U.S. Environmental Protection Agency (EPA) seeking a copy of records from the January 1, 2009 to February 6, 2013 regarding the scope and application of the non-discretionary duty to take certain action under the Clear Air Act; the course of action to take with respect to any Regional Haze State Implementation Plan; and other records as described in your request.

We have reviewed your fee waiver justification and based on the information provided, we are denying your request for a fee waiver. You have not expressed a specific intent to disseminate the information to the general public. As a result of you failing to meet the above criteria, accordingly, there is no need to address the remaining prongs of the fee waiver criteria. If the estimated cost exceeds $25.00 the Office of Air and Radiation will contact you regarding the cost of processing your request and seek an assurance of payment. They will be unable to process your request until they receive your written assurance of payment.

Under the FOIA, you have the right to appeal this determination to the National Freedom of Information Office, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, NW (2822T), Washington, DC 20460 (U.S. Postal Service Only), E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania

ATTACHMENT "B"

Avenue, NW. If you are submitting your appeal via hand delivery, courier service or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, NW, Room 6416J, Washington, DC 20004. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the FOI number listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Should you choose to appeal this determination, please be sure to fully address all factors required by EPA's FOIA Regulations, located at 40 C.F.R. § 2.107(l) in your appeal. If you have any questions concerning this determination please contact me at (202) 566-1667.

Sincerely,

Larry F. Gottesman
National FOIA Officer

Dear Mr. Eubanks:

I am writing in regard to the above-referenced fee waiver appeal. My office is in receipt of your appeal file and is currently reviewing it for a response. We require a brief extension of time to complete the process of reviewing and finalizing the response. We expect to provide you with a determination on or before May 15, 2013. Thank you for your patience, and please contact me if you have any questions concerning your appeal.

Sincerely,

Lynn Kelly
Attorney-Advisor
U.S. Environmental Protection Agency
General Law Office
Office of General Counsel
(202) 564-3266
Office # 7426V

RE: Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)
Kelly, Lynn
to:
Clayton.Eubanks@oag.ok.gov
05/15/2013 03:10 PM
Hide Details
From: "Kelly, Lynn" <Kelly.Lynn@epa.gov>
To: "Clayton.Eubanks@oag.ok.gov" <Clayton.Eubanks@oag.ok.gov>,
History: This message has been forwarded.

Mr. Eubanks:

I am writing with an update about the status of the above-referenced fee waiver appeal. My office is reviewing your appeal file, however we require one additional extension of time to complete the process of finalizing the response. We expect to provide you with a determination on or before May 31, 2013. Thank you again for your continued patience, and please contact me if you have any questions concerning your appeal.

Sincerely,

Lynn Kelly
Attorney-Advisor
U.S. Environmental Protection Agency
General Law Office
Office of General Counsel
(202) 564-3266
Office # 7426V

From: Clayton.Eubanks@oag.ok.gov [mailto:Clayton.Eubanks@oag.ok.gov]
Sent: Thursday, May 02, 2013 11:23 AM
To: Kelly, Lynn
Subject: Re: Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)

Thank you.

P. Clayton Eubanks
Deputy Solicitor General
Office of the Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105
Tel: (405) 522-8992
Fax:(405) 522-0085
clayton.eubanks@oag.ok.gov

From: "Kelly, Lynn" <Kelly.Lynn@epa.gov>
To: "clayton.eubanks@oag.ok.gov" <clayton.eubanks@oag.ok.gov>,
Date: 05/02/2013 10:20 AM
Subject: Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)

EXHIBIT 5

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 3 1 2013

OFFICE OF
GENERAL COUNSEL

Mr. P. Clayton Eubanks
Deputy Solicitor General
Office of Oklahoma Attorney General
313 N.E. 21st Street
Oklahoma City, OK 73105

Re: Freedom of Information Act Appeal No. EPA-HQ-2013-004583 (Request No. EPA-HQ-2013-003886)

Dear Mr. Eubanks:

I am responding to your March 15, 2013 fee waiver appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. You appealed the February 22, 2013 decision of Larry Gottesman of the U.S. Environmental Protection Agency ("EPA" or "Agency") to deny your request for a fee waiver ("initial fee waiver denial"). You seek a waiver of all fees associated with your FOIA request for documents related to consideration, proposal, or discussion of three subjects related to the Clean Air Act ("CAA") with non-governmental organizations whose purpose may include environmental or natural resource advocacy and policy. You requested a waiver of all fees associated with processing your request, and stated you were willing to pay $5.00 (five dollars) in the event your fee waiver was denied.

On February 22, 2013, Mr. Gottesman, the EPA's National FOIA Officer, denied your request for a fee waiver finding that you had failed to express specific intent to disseminate the information to the general public, thus failing to demonstrate that your request is likely to contribute to public understanding of a reasonably broad audience of persons interested in the subject matter.

I have carefully considered your request for a fee waiver, EPA's initial fee waiver denial, and your appeal. For the reasons set forth below, I have concluded that you do not have a proper request pending before the Agency, and therefore your appeal of the denial of a waiver of fees is moot.

Analysis

In reviewing your February 6, 2013 FOIA request in order to process your fee waiver appeal, this office has determined that your initial request fails to adequately describe the records sought, as required by the FOIA and by EPA's regulations. 5 U.S.C. § 552(a)(3); 40 C.F.R. § 2.102(c). You seek records "which discuss or in any way relate to" any "consideration, proposal,

EXHIBIT
tabbies 4

or discussion with" "Interested Organizations" or any "Other Organizations" on three broad topics related to the Clean Air Act. Request at 1. At least one category of your request (records described in paragraph (a)(i)) is almost identical to a request that was previously denied by EPA as improper on September 14, 2012. While you have tailored the subject matter of the next two categories of records you are seeking ((a)(ii) and (a)(iii)) by focusing only on Regional Haze State Implementation Plans ("SIPs"), you have not provided enough information to permit an employee reasonably familiar with the subject matter to identify the records you are seeking. This is because despite reducing the provided list of "Interested Organizations" from eighty to seventeen, you are still requesting documents related to any communication between EPA and "Other Organizations" which you broadly define as "any other non-governmental organization, including citizen organizations whose purpose or interest may include environmental or natural resource advocacy and policy." Request at 1. This qualifying statement about requesting records from "Other Organizations" effectively re-incorporates the sixty-three excluded organization from the list in your original request, as well as numerous other unnamed organizations, and would require EPA staff to also search for and determine the organizational mission of any 3rd party that may have had a communication with the Agency on topics under the CAA. Broad, sweeping requests lacking specificity are not sufficient. American Fed. of Gov't Employees v. Dep't of Commerce, 632 F.Supp. 1272, 1277 (D.D.C.1986). Additionally, requests for documents which "refer or relate to" a subject are routinely "subject to criticism as overbroad since life, like law, is 'a seamless web,' and all documents 'relate' to all others in some remote fashion." Massachusetts v. Dep't of Health & Human Servs., 727 F.Supp. 35, 36 n.2 (D.Mass 1989).

Additionally, paragraph (b) of your request is nearly identical to the request previously denied by EPA as an improper request on September 14, 2012. Instead of requesting "all documents" that in any way relate to the three broad categories of your request from every single headquarters and regional EPA office, you have requested records from sixteen different offices instead of twenty-one. Request at 2-3. You are requesting all documents sent or received by staff in sixteen EPA offices on three general subjects, for a period of almost four and a half years. Such "all documents" requests have been found by courts to be improper. *See*, Dale v. IRS, 238 F.Supp 2d 99, 104 (D.D.C. 2002); Mason v. Callaway, 554 F.2d 129, 131 (4th Cir.1977). By way of comparison, a recent District of Columbia decision found that a similar request that amounted to a request for all internal emails of 25 individuals over a two year period failed to reasonably describe the records sought, and was unreasonably burdensome. Hainey v. U.S. Dep't of Interior, No. 11-1725 (2013 WL 659090 (D.D.C.)). The court found that the burden of amassing this volume of information, in addition to the time needed to review the records, conflicted with settled case law that "an agency need not honor a [FOIA] request that requires 'an unreasonably burdensome search'" and that "FOIA was not intended to reduce government agencies to full-time investigators on behalf of requestors." Id. At *8-9 (internal citations omitted).

For the reasons stated above, I have determined that your request does not reasonably identify the records you are seeking. Because this is your second attempt at submitting a properly formulated request, I will take this opportunity to indicate how your request might be modified to reasonably identify the records you are seeking. In order to reasonably identify the records you are seeking, you should identify the records with particular specificity. EPA regulations state that "whenever possible you should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter" and also that "[t]he more specific you are about the records or type of records you want, the more likely EPA will be able to identify and locate records responsive to your request." 40 C.F.R. § 2.103(c). Often this is accomplished by providing key words which employees may use to easily search for and determine if there are responsive records. For example, should you limit your request to records communicating with any *specifically identified* organization AND referencing settlement relating to the three subject areas you identify, your request would enable EPA staff familiar with the subject area to search for and locate any responsive records.

Because I have determined that you do not have a proper request pending before the Agency, your appeal of EPA's initial denial of a fee waiver for your request is moot, and I am closing your appeal file. Although I need not address the merits of your fee waiver request and appeal at this time, I have included the following discussion in order to assist you in submitting any properly formulated request for records and a waiver of fees.

Fee Waiver Discussion

The statutory standard for evaluating fee waiver requests is whether "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government; and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

EPA's regulations at 40 C.F.R. § 2.107(l)(2) and (3) establish the same standard. EPA must consider four conditions to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns the operations or activities of the Federal government; (2) whether the disclosure is likely to contribute to an understanding of government operations or activities; (3) whether the disclosure is likely to contribute to public understanding of a reasonably broad audience of persons interested in the subject matter; and (4) whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2). EPA must consider two conditions to determine whether a request is primarily in the commercial interest of the requester: (1) whether the requester has a commercial interest that would be furthered by the requested documents; and (2) whether any such commercial interest outweighs the public interest in disclosure. 40 C.F.R. § 2.107(l)(3).

Finally, the Agency considers fee waiver requests on a case-by-case basis. Judicial Watch, Inc. v. DOJ, 185 F. Supp. 2d 54, 60 (D.D.C. 2002). Whether a requester may have

received a fee waiver in the past is not relevant for a subsequent request.

Public Interest Prong of the Fee Waiver Test

A requester seeking a fee waiver bears the burden of showing that the disclosure of the responsive documents is in the public interest and is not primarily in the requester's commercial interest. See Judicial Watch, Inc., 185 F. Supp. 2d at 60; Larson v. CIA, 843 F. 2d 1481, 1483 (D.C. Cir. 1988). Conclusory statements or mere allegations that the disclosure of the requested documents will serve the public interest are not sufficient to meet the burden. See McClellan Ecological Seepage Situation, 835 F.2d at 1285; Judicial Watch, Inc. v. Rossotti, 326 F.3d 1309, 1312 (D.C. Cir. 2003). The requester must therefore explain with reasonable specificity how disclosure of the requested information is in the public interest by demonstrating how such disclosure is likely to contribute significantly to public understanding of government operations or activities. Larson, 843 F.2d at 1483. Furthermore, if the circumstances surrounding this request (e.g., the content of the request, the type of requester, the purpose for which the request is made, the requester's ability to disseminate the information to the public) clarify the point of the request, the requester must set forth these circumstances. See Larson, 843 F.2d at 1483.

Elements 2 and 4

I will discuss the second and fourth factors of the public interest prong at the same time. The second factor to consider is the informative value of the documents to be disclosed. 40 C.F.R. § 2.107(l)(2)(ii). The requested documents must be "meaningfully informative about government operations or activities in order to be 'likely to contribute' to an increased public understanding of those operations or activities." 40 C.F.R. § 2.107(l)(2)(ii). The disclosure of information already in the public domain would have no informative value since it would not add to the public's understanding of government. Id. The fourth factor to consider is how the disclosure of the requested records is likely to contribute "significantly" to public understanding of government operations or activities. 40 C.F.R. § 2.107(l)(2)(iv). Disclosure of the information should significantly enhance the public's understanding of the subject in question as compared to the level of public understanding prior to disclosure. Id.

In support of your request, you generally state that "[t]he requested documents are sought in order to more clearly illuminate the operations and activities of EPA. As such, release of the requested documents will significantly contribute to public understanding and oversight of the EPA's operations, particularly regarding the quality of the EPA's activities and the efficacy of both Congressional directives and EPA policies and regulations relating to the Requesting States." Request at 4. You also state that "disclosure 'is likely to contribute' to an understanding of government operations or activities'" and "disclosure is likely to contribute 'significantly' to public understanding of government operations and activities" (repeating the regulatory

standard). Request at 5. These general statements are typically insufficient to support a waiver of fees . Judicial Watch Inc. v. DOJ, 185 F.Supp 2d 54, 61-62 (D.D.C. 2002). You also state that "the public currently has no access to the requested Subject information," however information about the Clean Air Act, Regional Haze, and the public comment process around negotiated settlements is available on the Agency's program website[1] as well as on the websites of the Regional Planning Organizations' and States' sites. Request at 8; Appeal at 7.

Your less generalized statements in support of factors two and four also fail to demonstrate that your request satisfies the standard established by these elements. You state that your request seeks "information that will result in understanding EPA's interactions with non-governmental advocacy groups and how those interactions influence how EPA sets policy that affects the public interest," that will help "understand and make public EPA's decision-making process in negotiating and entering into litigation settlements," and will educate the public on "the importance of cooperative federalism and why the States should continue to have the lead role in implementing federal environmental programs." Request at 7; Appeal at 3. As compared to the broad categories of your request, there is no clear nexus between the records requested and the areas of education identified above. For example, your request is in no way limited to communications with non-governmental organizations, or to discussions about cooperative federalism. Numerous records you have requested will not shed any light on these subjects, and you have not explained how all of the requested records will meaningfully inform the public about these stated topics.

Element 3

Additionally, the requester seeking a fee waiver must also demonstrate that the disclosure of the requested documents will likely contribute to the public understanding, *i.e.*, the understanding of "a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." 40 C.F.R. § 107(l)(2)(iii). The requester's expertise in the subject area and his or her "ability and intention to effectively convey information to the public will be considered." Id. A requester must express a specific intent to publish or disseminate the requested information, and identify a specific increase in public understanding that would result from such dissemination. Judicial Watch, Inc.v. DOJ, 122 F. Supp. 2d 5, 10 (D.D.C. 2000). A requester who does not provide specific information regarding a method of disseminating requested information will not meet the third factor, even if the requester has the ability to disseminate information. Judicial Watch, Inc. V. DOJ, 122 F. Supp. 2d 13, 18-19 (D.D.C. 2000).

---

[1] *See, e.g.* http://www.epa.gov/airquality/visibility/program.html; http://www.epa.gov/airquality/visibility/actions.html.

You state that the "Requesting States" will compile and summarize the requested records into a report that will be distributed to the general public, the media, and Congress. Appeal at 6. You also state that the report will be available state libraries and web sites. Id. These general statements do not provide enough information to demonstrate a tangible or cognizable plan to disseminate the information. See, Van Fripp v. Parks, 2000 U.S. Dist. LEXIS 20158, *20 (D.D.C. Mar. 16, 2000) ("Obtaining placement in a library is, at best, a passive method of distribution that does not discharge the plaintiff's affirmative burden to disseminate information."). While it is possible that a report written using information obtained from the Agency could be informative, these general statements about passive methods of distribution, especially when unaccompanied by details about the authorship of a report by the staff of thirteen different state governments or about the intended audience, fails to demonstrate a specific intent to publish or disseminate the requested information.

This discussion above is being provided to you in order to assist you in understanding the Agency's obligations to evaluate fee waiver requests using the standards contained in EPA's regulations and the FOIA. Should you choose to submit a new request, please feel free to contact the Agency's FOIA Office for information about what you may provide in order to submit a proper request, and to provide the information necessary for the Agency to evaluate a request for a fee waiver.

Conclusion

This letter constitutes EPA's final determination on this matter. Pursuant to 5 U.S.C. 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have your principal place of business, or the district in which the records are situated, or in the District of Columbia. As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) within the National Archives and Records Administration was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, Room 2510, 8610 Adelphi Road, College Park, MD, 20740-6001; e-mail, ogis@nara.gov; telephone, 301-837-1996 or 1-877-684-6448; and facsimile, 301-837-0348.

Please call Lynn Kelly at 202-564-3266 if you have any questions regarding this determination.

Sincerely,

Kevin M. Miller
Assistant General Counsel
General Law Office

cc: HQ FOI Office

From: Al Armendariz
To: Layla Mansuri
Subject: Re: FOIA requests for the NM and OK FIPs
Date: 01/20/2011 08:07 PM

Thanks.

Al

Al Armendariz
Regional Administrator
U.S. EPA
Region 6
armendariz.al@epa.gov
office: 214-665-2100
twitter: @al_armendariz
▼ Layla Mansuri

----- Original Message -----
From: Layla Mansuri
Sent: 01/20/2011 04:30 PM CST
To: Al Armendariz; Chrissy Mann; Lawrence Starfield; Javier Balli
Cc: Carrie Clayton
Subject: Fw: FOIA requests for the NM and OK FIPs

FYI.

----- Forwarded by Layla Mansuri/R6/USEPA/US on 01/20/2011 04:29 PM -----

From: Agustin Carbo-Lugo/R6/USEPA/US
To: Layla Mansuri/R6/USEPA/US@EPA
Date: 01/20/2011 04:11 PM
Subject: Re: Fw: FOIA requests for the NM and OK FIPs

Layla,

After talking to Joe Kordzi, we have decided to request additional time for both NM and OK's FOIAs. I am requesting an additional time of 30 days from today. Still have no reply from the attorneys. We are only limiting the scope for the OK FOIA, for questions 3 and 4. You may want to wait until I receive confirmation on this one. Most of NM's requests are already in the e docket for the NPRM. We decided to continue uploading in the box all the emails related just to the San Juan Generating Station (as stated in the request).

Hope this helps :)

Agustin F. Carbo-Lugo
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 6

1445 Ross Ave. (6-RC-M)
Dallas, TX 75202
Tel: (214) 665-8037
Fax: (214) 665-2182

-----Layla Mansuri/R6/USEPA/US wrote: -----
To: Agustin Carbo-Lugo/R6/USEPA/US@EPA
From: Layla Mansuri/R6/USEPA/US
Date: 01/20/2011 04:01PM
Cc: Chrissy Mann/R6/USEPA/US@EPA, Leticia Lane/R6/USEPA/US@EPA, Yerusha Beaver/R6/USEPA/US@EPA
Subject: Re: Fw: FOIA requests for the NM and OK FIPs

Agustin:

Hi. Just following up.

I have a couple of questions.

1. What are the current deadlines?
2. Was there any narrowing to the requests? Is this in the works?

Thanks.
Layla

Agustin Carbo-Lugo---01/18/2011 10:11:57 AM---Layla, I'll be helping PD with both FOIA requests. In December we requested an extension of time on

From: Agustin Carbo-Lugo/R6/USEPA/US

To: Layla Mansuri/R6/USEPA/US@EPA

Date: 01/18/2011 10:11 AM

Subject: Fw: FOIA requests for the NM and OK FIPs

Layla,

I'll be helping PD with both FOIA requests. In December we requested an extension of time on the OK FOIA and it appears it was granted. This morning I had a meeting with PD and we will be requesting to narrow the scope of the request. I should have more information this afternoon. I'll get back to you.

Agustin F. Carbo-Lugo
Office of Regional Counsel

U.S. Environmental Protection Agency, Region 6
1445 Ross Ave. (6-RC-M)
Dallas, TX 75202
Tel: (214) 665-8037
Fax: (214) 665-2182
----- Forwarded by Agustin Carbo-Lugo/R6/USEPA/US on 01/18/2011 10:07 AM -----

From: Lucinda Watson/R6/USEPA/US

To: Suzanne Smith/R6/USEPA/US@EPA, Ben Harrison/R6/USEPA/US@EPA

Cc: Agustin Carbo-Lugo/R6/USEPA/US@EPA, Yerusha Beaver/R6/USEPA/US@EPA, Carrie Thomas/R6/USEPA/US@EPA

Date: 01/13/2011 04:40 PM

Subject: Re: Fw: FOIA requests for the NM and OK FIPs

OGC (Kevin and Geoff) and I think we need to assign Agustin and Yerusha to handle the FOIA coordination for the NM and OK FIPs documents.

It is my understanding that Joe worked with Richard Wessels and is getting the LotusNotes links prepared for R6, RTP, and DC.

But we believe that we need a lawyer, e.g., Agustin, to call the requestors and narrow the scope.
Agustin also could work with Joe to get the time estimates and work with whomever in RTP and DC to get their time estimates.
Agustin and Joe could draft now the letter suspending the request until we get a sufficient fee commitment.
Since it will be Agustin's first huge FOIA assignment, I am sure he will need to turn to Yerusha for assistance.

OGC is willing to offer any legal assistance from their FOIA experts since much of the information concerns business information, contractor information, although I feel like Paul already has explained EPA's position on these materials and PD seems to understand.

FOIA Exemption (b)(5) - Deliberative Process Privilege [redacted]

Re: Fw: FOIA requests for the NM and OK FIPs

Re: Fw: FOIA requests for the NM and OK FIPs

Carrie Thomas to: Lucinda Watson 01/13/2011 02:48 PM

Cc: Agustin Carbo-Lugo, Suzanne Smith, Yerusha Beaver

Hi Lucinda,
I agree with Geoff's comments.

For the original QF/FP FOIA, we did suspend the request in writing until we were able to get a sufficient fee commitment from the requestor ($10,000 for the R6 response). We suggested that amount based on a cost estimate after we asked everyone with responsive documents to guess how long it would take them to respond. We are continuing to send rolling responses until we hit that amount, which we are very close to doing. We are also going to contact the requestor to ask if they would like to commit additional fees to cover the remainder of the response and a denial log of what we are withholding and why.

We also asked the requestor to narrow the scope, but they were under no obligation to do so. They did, in fact, narrow it slightly (hence the list of excluded records in the instructions e-mail).

Yerusha - correct me if I've misstated anything. Thanks,

Carrie K. Thomas
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 6
1445 Ross Ave. (6-RC-M)
Dallas, TX 75202
Tel: (214) 665-7121
Fax: (214) 665-2182

Lucinda Watson---01/13/2011 12:49:49 PM---For the QF/FP FOIA, did we first contact them to try to narrow the request? Next, did we send

a let

From: Lucinda Watson/R6/USEPA/US

To: Carrie Thomas/R6/USEPA/US@EPA, Suzanne Smith/R6/USEPA/US@EPA

Cc: Agustin Carbo-Lugo/R6/USEPA/US@EPA

Date: 01/13/2011 12:49 PM

Subject: Fw: FOIA requests for the NM and OK FIPs

For the QF/FP FOIA, did we first contact them to try to narrow the request?
Next, did we send a letter suspending our response until they agreed to pay the estimated amount?

Of course, I cannot figure out how we would have an estimate until everyone has finished their search for responsive documents?

Bottom line - how do I answer OGC's e-mail so we sound like we know what we are doing?

----- Forwarded by Lucinda Watson/R6/USEPA/US on 01/13/2011 12:47 PM -----

Re: Fw: FOIA requests for the NM and OK FIPs

Geoffrey Wilcox to: Joe Kordzi 01/12/2011 05:22 PM

Cc: Lea Anderson, Todd Hawes, Kevin McLean, Lucinda Watson, Agustin Carbo-Lugo

---

PRIVILEGED COMMUNICATION

Joe:

Let's have a chat about this topic.

Unless something has changed, my understanding is that there are some standard protocols we usually follow in such FOIA requests.

One of the first steps is to alert the requestor that they need to narrow their request because it is overbroad, and secondarily that it will probably cost more than the amount of $ they agreed to pay.

Unless and until they respond to that, and tell us they will pay more, we usally tell them in writing that we are suspending our response to their request until they get back to us.

Lucinda and Augustin may have more recent experience than me in dealing with such things.

If not, we may want to call one of the OGC FOIA gurus for a consultation. FOIA Exemption (b)(5) - Deliberative Process Privilege

G

Joe Kordzi---01/12/2011 04:09:20 PM---yes thanks - I've called Mr. Orkin to inform him I think the bill would exceed $500. He hasn't resp

From: Joe Kordzi/R6/USEPA/US

To: Lea Anderson/DC/USEPA/US@EPA

Cc: Geoffrey Wilcox/DC/USEPA/US@EPA, Todd Hawes/RTP/USEPA/US@EPA

Date: 01/12/2011 04:09 PM

Subject: Re: Fw: FOIA requests for the NM and OK FIPs

yes thanks - I've called Mr. Orkin to inform him I think the bill would exceed $500. He hasn't responded yet.

Regards,

Joe

" ... and miles to go before I sleep."
-- Robert Frost

Lea Anderson---01/12/2011 02:13:06 PM---Joe, I assume (hopefully) that we are at least charging the requestor for our search time? Please

From: Lea Anderson/DC/USEPA/US

To: Joe Kordzi/R6/USEPA/US@EPA

Cc: Geoffrey Wilcox/DC/USEPA/US@EPA, Todd Hawes/RTP/USEPA/US@EPA

Date: 01/12/2011 02:13 PM

Subject: Re: Fw: FOIA requests for the NM and OK FIPs

Joe,
I assume (hopefully) that we are at least charging the requestor for our search time? Please let me know if I should keep track of the time spend on the search.

thanks,
Lea

M. Lea Anderson
EPA Office of General Counsel
Phone: (202) 564-5571

Joe Kordzi---01/12/2011 01:58:30 PM---Welcome to my FOIAs. I will separately send you some Lotus Notes buttons and instructions so you ca

From: Joe Kordzi/R6/USEPA/US

To: Geoffrey Wilcox/DC/USEPA/US@EPA, Lea Anderson/DC/USEPA/US@EPA, Todd Hawes/RTP/USEPA/US@EPA

Date: 01/12/2011 01:58 PM

Subject: Fw: FOIA requests for the NM and OK FIPs

Welcome to my FOIAs. I will separately send you some Lotus Notes buttons and instructions so you can load your emails.

Regards,

Joe

" ... and miles to go before I sleep."
-- Robert Frost

----- Forwarded by Joe Kordzi/R6/USEPA/US on 01/12/2011 12:52 PM -----

From: Joe Kordzi/R6/USEPA/US

To: R6 6PD-L

Cc: Lucinda Watson/R6/USEPA/US@EPA, Agustin Carbo-Lugo/R6/USEPA/US@EPA

Date: 01/04/2011 11:19 AM

Subject: FOIA requests for the NM and OK FIPs

Enclosed are two extensive FOIA requests. The first one is related to our just proposed NM regional haze SIP-FIP, and mainly concerns the San Juan Generating Station. The second one basically requests everything we have concerning the OK regional haze SIP-FIP which we are currently working on. [redacted] I looked into getting drop boxes set up for you to submit your emails, but balked at the 33 page set of instructions that accompanied it, and the lack of an easy, workable way to get those emails to the requestor, so we will do it the old fashioned way. If you have anything that is responsive, pls print it off and give it to me. If that includes documents, pls put them on a CD and name them in such a way the requestor will know which email they go with. I cannot provide guidance on what can be released. According to ORC, we should have all taken that training and are apparently on our own. I'm sorry for not starting this earlier, but I was busy with the FIPs and my efforts to get clarification/help on this didn't work out.

1. The due date for the NM FOIA was 12/30/10. This is the second FOIA on this subject from the same person. A request has been made to get an extension, but as before, the requestor has not been responsive to that request. I think much of what is requested will actually be in the docket in a day or so. However, you may have emails that are responsive.

2. The due date for the OK regional haze SIP-FIP has been extended to 1/15/11, but the requestor expected we would do a rolling submittal, that for the reasons outlined above, didn't work out. Therefore, pls also assume we are also late on this one as well. Because we have not yet proposed our decision on this action, I expect much of what is requested will not be able to be released, but that if you to decide. Here is something that may help: foia.navy.mil/Exemptionb5Slides.ppt

Pls have everything to me by noon, 1/11/11. If that's not possible, pls let me know ASAP.

[attachment "SJGS FOIA.pdf" deleted by Lea Anderson/DC/USEPA/US] [attachment "OK SIP-FIP FOIA.pdf" deleted by Lea Anderson/DC/USEPA/US]

Regards,

Joe

" ... and miles to go before I sleep."
-- Robert Frost

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21
OKLAHOMA CITY, OK 73105

RECEIVED JUL 2 2 2013

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Bob Perciasepe, Acting Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460

FIRST CLASS MAIL

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS. FOLD AT DOTTED LINE

91 7199 9991 7032 0593 0232

JONES DAY

77 WEST WACKER • CHICAGO, ILLINOIS 60601.1692
TELEPHONE: +1.312.782.3939 • FACSIMILE: +1.312.782.8585

Direct Number: (312) 269-4388
ctwehland@jonesday.com

727418-610067

August 23, 2013

VIA CERTIFIED MAIL

Gina McCarthy
Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington DC 20460

Re: **Notice of Intent to Sue Pursuant to 42 U.S.C. § 7604(b)(2) for Failure to Grant or Deny Petition for Reconsideration**

Dear Administrator McCarthy,

Pursuant to 42 U.S.C. § 7604(b)(2) and 40 C.F.R. Part 54, Oklahoma Gas & Electric Company ("OG&E") is providing notice that it intends to file suit against you for a "failure of the Administrator [of the United States Environmental Protection Agency (EPA)] to perform an[] act or duty under this chapter which is not discretionary with the Administrator" within the meaning of the Clean Air Act. Specifically, EPA has a duty to grant or deny the petition for reconsideration and request for administrative stay ("Petition") that OG&E and the State of Oklahoma submitted for EPA's final rule published on December 28, 2011, titled "Approval and Promulgation of Implementation Plans; Oklahoma; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations." 76 Fed. Reg. 81,728 (Dec. 28, 2011) ("Final Rule").

OG&E and the State of Oklahoma submitted the Petition to EPA almost a year and a half ago, requesting that EPA grant reconsideration of two issues of central relevance that arose after the close of the public comment period. The issues requested for reconsideration are:

1) EPA's "overnight cost" approach to the cost effectiveness analysis under the Agency's Office of Air Quality Planning and Standards Control Cost Manual (Doc. ID No. EPA-R06-OAR-2010-0190-0060, dated January 2002), and

2) a "number of days" approach to visibility improvement.

The Petition also requested that EPA stay the Final Rule because the rule is contrary to applicable law and its implementation will cause irreparable harm to both the State of Oklahoma and OG&E. A complete copy of the Petition is included with this letter.

Pursuant to 42 U.S.C. § 7607(d)(7)(B), EPA is obligated to grant the Petition because OG&E and the State of Oklahoma have demonstrated that the objections raised in the Petition are of central relevance and arose after the close of the public comment period (but within the time specific for judicial review). Furthermore, the Administrative Procedure Act gives OG&E and the State "the right to petition for the . . . repeal of a rule[,]" 5 U.S.C. § 553(e), and requires EPA to resolve such petition "within a reasonable time." *Id.* at § 555(b). A delay of almost a year and a half in responding to the Petition filed by OG&E and the State of Oklahoma constitutes unreasonable delay of non-discretionary agency action. *See* 5 U.S.C. § 706(1); 42 U.S.C. § 7604(a). Therefore, OG&E intends to file suit within 60 days if EPA has not completed its duty by that time.

As required by 40 C.F.R. § 54.3, the person giving this notice is Oklahoma Gas & Electric Company, P.O. Box 321 Oklahoma City, Oklahoma 73101-0321, Telephone: (405) 553-3000. However, please direct all correspondence and communications regarding this matter to the undersigned counsel for OG&E.

Sincerely,

C T Wehland
CP

Charles T. Wehland
Counsel for OG&E

Enclosure

cc: Ron Curry
Administrator, EPA Region 6
1445 Ross Avenue
Suite 1200
Dallas, Texas 75202

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

STATE OF OKLAHOMA EX REL. SCOTT PRUITT, in his official capacity as Attorney General of Oklahoma, **and** **OKLAHOMA GAS AND ELECTRIC COMPANY** **Petitioners**	**EPA Docket #:** **EPA-R06-OAR-2010-0190**

PETITION FOR RECONSIDERATION AND REQUEST FOR ADMINISTRATIVE STAY

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ATTORNEYS FOR OKLAHOMA GAS & ELECTRIC COMPANY

PETITION FOR RECONSIDERATION
AND REQUEST FOR ADMINISTRATIVE STAY

Pursuant to Clean Air Act Section 307(d)(7)(B); 42 U.S.C. § 7607(d)(7)(B); 5 U.S.C. § 553(e); 5 U.S.C. § 705; and Fed. R. App. P. 18(a)(1), the State of Oklahoma, through the Attorney General acting on behalf of Gary Sherrer, Secretary of Environment, who is the duly appointed designee of Governor Mary Fallin ("Oklahoma" or the "State") and Oklahoma Gas & Electric Company ("OG&E") (together, Oklahoma and OG&E are referred to herein as "Petitioners") respectfully petition the U.S. Environmental Protection Agency ("EPA" or "Agency") for reconsideration and to grant an immediate administrative stay of the Federal Implementation Plan portion ("Oklahoma FIP" or "FIP") of the Agency's final rule published on December 28, 2011, titled "Approval and Promulgation of Implementation Plans; Oklahoma; Federal Implementation Plan for Interstate Transport of Pollution Affecting Visibility and Best Available Retrofit Technology Determinations." 76 Fed. Reg. 81,728 (Dec. 28, 2011) ("Final Rule").[1]

Reconsideration is warranted because in adopting the Final Rule, EPA raised and relied on for the first time (i) an "overnight cost" approach to the cost effectiveness analysis under EPA's Office of Air Quality Planning and Standards Control Cost Manual ("CCM") (Doc. ID No. EPA-R06-OAR-2010-0190-0060, dated January 2002), and (ii) a "number of days" approach to visibility improvement. Because these concepts were not raised in the proposed rule, Petitioners were deprived of an opportunity to address them during the comment period.

A stay of the Oklahoma FIP pending judicial review is warranted because the FIP establishes federally enforceable emission limits for the control of sulfur dioxide ("SO_2") for,

[1] Petitioners do not request a stay of the portion of the Final Rule that approved Oklahoma's BART determinations for particulate matter and nitrogen oxides at OG&E's Muskogee, Sooner and Seminole Generating Stations and for SO_2 at the Seminole Generating Station (Units 1, 2 and 3).

among others, four coal-fired electrical generating units ("EGUs") in Oklahoma that are operated by OG&E: Units 4 and 5 at the Muskogee Generating Station ("Muskogee Units") and Units 1 and 2 at the Sooner Generating Station ("Sooner Units") (collectively, the "OG&E Units"). The FIP is contrary to applicable law and its implementation at this time will cause irreparable harm to both the State of Oklahoma and OG&E. Not only does the FIP flout the Congressional mandate that States have the primary role in designing regional haze programs, it also undermines the State's goal of continuing the use of more environmentally friendly low sulfur coal, and will almost certainly lead to economic distress from higher electricity rates for all Oklahoma consumers, including the State and its agencies. Further, as the owner and operator of the OG&E Units, OG&E will be forced to immediately begin spending millions of dollars in order to meet the FIP's five-year compliance deadline, expenditures that may be wholly unnecessary depending on the outcome of Petitioners' legal challenges to the FIP.[2] Since these legal challenges are likely to succeed on the merits, and because a stay is in the public interest and necessary to prevent irreparable harm to Oklahoma, OG&E and OG&E's customers, EPA should grant Petitioners' request.

INTRODUCTION AND BACKGROUND

I. The OG&E Units

OG&E's affected Muskogee Units, located near Muskogee, Oklahoma, are two approximately 500 MW coal-fired generating units, and the Sooner Units, located near Red Rock, Oklahoma, are two approximately 500 MW coal-fired generating units. Affidavit of Ken Johnson ("Johnson Aff") ¶ 2, attached hereto as Ex. A. For more than a decade, OG&E has voluntarily burned very low sulfur coal at the OG&E Units in order to limit SO_2 emissions. (*Id.* ¶ 5.)

[2] In addition to filing this Petition with EPA, Petitioners are also filing petitions for review in the United States Court of Appeals for the Tenth Circuit, seeking review of those portions of the Final Rule that disapproved in part the Oklahoma SIP and that promulgated the FIP.

OG&E is Oklahoma's largest electricity provider and serves approximately 789,000 customers in 268 communities in Oklahoma and western Arkansas. OG&E's service area covers 30,000 square miles in Oklahoma and western Arkansas, including Oklahoma City, the largest city in Oklahoma, and Fort Smith, Arkansas, the second largest city in that state. (*Id.* ¶ 4.)

OG&E's load responsibility peak demand was over 6,500 MWs on August 3, 2011. OG&E's current generation portfolio has a combined capability of 6,753 MW, which includes intermittent wind generation capability of 449 MW. In 2011, coal-fired generation represented approximately 38 percent of OG&E's total generation capability, but produced almost 60 percent of the OG&E-generated energy. OG&E's 2,500 MW of coal-fired generation is operated as the primary baseload generation in its generation portfolio. (*Id.* ¶ 5.)

OG&E is a member of the Southwest Power Pool, Inc. ("SPP") Regional Transmission Organization ("RTO"). The OG&E Units serve as integral and essential generation resources within the SPP, and OG&E cannot meet its load responsibilities without those units. The North American Electric Reliability Corporation ("NERC"), certified by the Federal Energy Regulatory Commission ("FERC"), establishes and enforces reliability standards for the North American bulk electric system. SPP is the Regional Entity responsible for coordinating and promoting bulk electric system reliability in the region that includes Oklahoma, Arkansas, Kansas, Missouri, Nebraska, Texas, Louisiana, and New Mexico. NERC, FERC and the SPP continually monitor whether OG&E is complying with reliability standards, including maintaining generation to meet load plus reserves. (*Id.* ¶ 7.)

II. The EPA Rulemaking at Issue

In Section 169A of the 1977 Amendments to the Clean Air Act ("CAA" or "Act"), Congress created a program for protecting visibility in the nation's national parks and wilderness areas. This section establishes as a national goal the "prevention of any future, and the

remedying of any existing, impairment of visibility in mandatory Class I federal areas which impairment results from manmade air pollution." 42 U.S.C. § 7491(a)(1). However, Congress recognized that this program requires a delicate balance that considers the timing, cost and economic impact of alternative methods to achieve such goals. 42 U.S.C. § 7491(g)(1) ("In determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance . . . .").

Congress added Section 169B to the Act in 1990 to address regional haze issues, and in 1999, EPA promulgated regulations addressing regional haze, 70 Fed. Reg. 39,104 (July 6, 2005), which are codified at 40 C.F.R. part 51, subpart P ("Regional Haze Regulations" or "RHR"). In passing the regional haze statutory provisions, Congress made clear its intent to delegate significant power to States to develop, review, approve, and implement site-specific implementation plans designed to make reasonable progress in achieving regional haze goals while balancing each State's unique economic and power needs. *See, e.g.*, 123 Cong. Rec. 13,696, 13,709 (1977). EPA has recognized that, because the issues to be balanced are uniquely State and source specific, "the State must determine the appropriate level of BART control for each source subject to BART." 70 Fed. Reg. at 39,107.

The CAA and RHR set forth the process that must be followed in determining BART, but neither requires any specific outcome. Thus, the CAA and RHR require, in part, that a State balance five factors in making a BART determination for each qualifying facility: (i) the costs of compliance; (ii) the energy and non-air quality environmental impacts of compliance; (iii) any existing pollution control technology in use at the source; (iv) the remaining useful life of the source; and (v) the degree of improvement in visibility that may be expected as a result of such technology. 42 U.S.C. § 7491(g)(2); 40 C.F.R. § 51.308(e)(1)(ii). EPA recognizes that "States

are free to determine the weight and significance to be assigned each factor." Proposed Oklahoma BART Rule, 76 Fed. Reg. 16,168, 16,174 (Mar. 22, 2011) ("Proposed Rule"). EPA further acknowledges that "[i]n some cases, the State may determine that a source has already installed sufficiently stringent emission controls for compliance with other programs . . . such that no additional controls would be needed for compliance with the BART requirement." Original Regional Haze Regulations, 64 Fed. Reg. 35,714, 35,740 (July 1, 1999).

The RHR require States to submit their BART determinations, along with other required elements, as state implementation plan revisions to EPA for approval ("Regional Haze SIPs"). Regional Haze SIPs are approved where they meet all of the applicable requirements of the Act. 42 U.S.C. § 7410(k)(3). In this instance, that means that the emission limitations developed to address regional haze had to be developed pursuant to the evaluation process and balancing of factors set out in the CAA and RHR. 42 U.S.C. § 7491(b).

In 2005, EPA revised the RHR to comply with *American Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002), and extended the deadline for States to submit their Regional Haze SIPs to EPA to December 17, 2007. 70 Fed. Reg. 39,104. On January 15, 2009, EPA published in the Federal Register a finding that 37 states (including Oklahoma) had failed to submit SIPs to EPA by the December 17, 2007 deadline. Finding of Failure to Submit SIPs for Regional Haze, 74 Fed. Reg. 2,392 (Jan. 15, 2009). EPA acknowledged in this final rule that its finding "starts a 'clock' for EPA to promulgate a [F]IP within two years." *Id.* EPA further acknowledged that "[i]f the state fails to submit the required SIPs [within two years] or if they submit SIPs that EPA cannot approve, then EPA will be required to develop the plans in lieu of the states." *Id.*

Oklahoma, on February 17, 2010, through the then Oklahoma Secretary of the Environment, submitted to EPA its regional haze revisions to the Oklahoma State Implementation Plan ("Oklahoma SIP"). *See* Oklahoma SIP, Doc. ID No. EPA-R06-OAR-2010-

0190-0002. After properly balancing the statutory factors, Oklahoma determined that low sulfur coal constituted BART for the OG&E Units and proposed a SIP that would have made OG&E's continued use of that low sulfur coal a mandatory condition of operation. In balancing the BART factors, Oklahoma had before it both a 2008 cost analysis for the OG&E Units—one that both EPA and the Oklahoma Department of Environmental Quality ("ODEQ") had stated was prepared in conformity with the CCM[3]—and a 2009 cost analysis prepared at ODEQ's and EPA's request that was more robust and site-specific than the 2008 cost estimate prepared pursuant to the CCM. *See id.* Oklahoma concluded, based on this and other information, that scrubbers are not cost effective for the OG&E Units.

Nonetheless, on January 15, 2011, almost one year after Oklahoma submitted its SIP, EPA had neither approved it nor promulgated a FIP. Thus, EPA failed to meet its statutory deadline to reject the Oklahoma SIP or promulgate a FIP. It was not until March 22, 2011, more than two years after it acknowledged its two-year "clock" had begun to run, and more than one year after Oklahoma submitted to EPA its Regional Haze SIP, that EPA published a proposed rule in the Federal Register proposing to approve in part and disapprove in part the Oklahoma SIP. *See* Proposed Rule, 76 Fed. Reg. 16,168. In the same notice and without waiting for its proposed disapproval of parts of the Oklahoma SIP to become final—*i.e.*, without waiting for and considering public comments on its proposed disapproval of portions of the Oklahoma SIP—EPA proposed a FIP to substitute its judgment for the judgment of Oklahoma on certain key issues statutorily delegated to Oklahoma, including the BART determinations for the OG&E Units.

On May 23, 2011, both the State of Oklahoma and OG&E (among others) separately submitted extensive legal, policy, and technical comments to EPA opposing its proposed action

[3] *See* Final Rule, 76 Fed. Reg. at 81,744 ("The Control Cost Manual must be followed to the extent possible when calculating the cost of BART controls.").

likelihood of success. *See Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002) ("If the plaintiff can establish that the latter three requirements tip strongly in his favor, the test is modified, and the plaintiff may meet the requirement for showing success on the merits by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.") (internal citations and quotations omitted).

For the reasons described below, Petitioners satisfy the requirements for reconsideration and satisfy each of the stay factors. EPA should, therefore, open a reconsideration proceeding and grant a stay of the requirements of the Oklahoma FIP in the interest of justice pending completion of the reconsideration proceeding and/or judicial review of the FIP in the Tenth Circuit.

I. Petitioners Are Likely To Succeed on the Merits and Are Entitled to Reconsideration.

Because EPA relies on new concepts at the center of its arguments in support of the partial disapproval of the Oklahoma SIP and the promulgation of the FIP, Petitioners are entitled to reconsideration. In addition, because the Final Rule is flawed in several critical respects, as shown below, Petitioners' challenges to the Final Rule in the U.S. Court of Appeals for the Tenth Circuit are likely to succeed on the merits. EPA's errors range from fundamental legal misinterpretations and improper applications of its own rules governing BART determinations to flawed technical determinations underlying its SIP rejection and FIP promulgation. EPA should consider the number and severity of flaws Petitioners have identified in evaluating their likelihood of success on the merits. Even if EPA believes that it may ultimately be able to sustain its actions upon judicial review, the fundamental nature and extent of Petitioners' arguments themselves provide a compelling basis for a stay pending that judicial review.

A. The EPA illegally usurped authority Congress delegated to Oklahoma.

The CAA and RHR require that *States*, not EPA, have the primary role in implementing the regional haze program, including making BART determinations. *See, e.g.*, CAA § 169A(b)(2)(A), (g)(2), 42 U.S.C. § 7491(b)(2)(A), (g)(2) ("in determining [BART] *the state* (or the Administrator in determining emission limitations which reflect such technology) shall take into consideration [the BART factors]") (emphasis added). EPA may disapprove a SIP and promulgate a FIP only where a State's SIP fails to meet minimum CAA requirements. 42 U.S.C. § 7410(k)(3); *see also Train v. Natural Res. Def. Council*, 421 U.S. 60, 79 (1975). The RHR and BART guidelines issued by EPA, 70 Fed. Reg. 39,104 (July 6, 2005), require only that States engage in the process of weighing the five statutory factors in determining BART for eligible sources in a manner consistent with the RHR. As the Oklahoma SIP clearly shows, Oklahoma did engage in that process in making its BART determinations for the OG&E Units.

Since ODEQ applied the statutory factors in promulgating the Oklahoma SIP, EPA cannot reject Oklahoma's BART determinations with respect to SO_2 emissions at the OG&E Units and promulgate a FIP substituting its judgment for that of the State. The U.S. Court of Appeals for the D.C. Circuit has affirmed that EPA's role in determining regional haze plans is limited, stating that the CAA "calls for states to play the lead role in designing and implementing regional haze programs." *Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 2 (D.C. Cir. 2002). The Court reversed a portion of EPA's original RHR because it found that EPA's method of analyzing visibility improvements distorted the statutory factors and was "inconsistent with the Act's provisions giving the *states* broad authority over BART determinations." *Id.* at 8 (emphasis added); *see also Utility Air Group v. EPA*, 471 F.3d 1333, 1336 (D.C. Cir. 2006) (The second step in a BART determination "requires states to determine the particular technology that an individual source 'subject to BART' must install").

EPA's actions here ignore the plain language of the CAA and the courts' recognition of the States' dominant role in determining BART. EPA simply does not have the authority to disapprove the Oklahoma SIP merely because it disagrees with Oklahoma's choice in emission controls for specific sources. *See Train*, 421 U.S. at 79 (EPA has "no authority to question the wisdom of a State's choice of emission limitations if they are part of a plan which satisfies the standards of [the Act] . . . the Agency may devise and promulgate a specific plan of its own only if a [s]tate fails to submit an implementation plan which satisfies those standards.").

EPA's only basis for suggesting that Oklahoma deviated from its guidelines is the assertion that the 2009 site-specific cost estimates did not comply with the CCM. This foundation is fundamentally flawed in at least two respects. First, EPA ignores OG&E's 2008 cost estimates, which EPA and ODEQ both acknowledged were calculated in accordance with the CCM. Instead, EPA focuses solely on and criticizes the 2009 site-specific cost estimates for not complying with the CCM. In fact, however, the 2009 cost estimates did use the categories of costs identified in the CCM, but at EPA's and ODEQ's request, went beyond the assumed CCM values to provide site specific, vendor-supported cost estimates for the BART analysis. EPA rejected significant portions of the 2009 site-specific costs estimates primarily because it found that deviations from the CCM were not adequately documented or supported, and in many instances it assumed this resulted in substantial double counting of expenses. While OG&E disputes EPA's conclusion regarding the 2009 cost estimates, the proper response by EPA once it reached that conclusion should have been to return to the 2008 cost estimates, which both EPA and ODEQ had stated complied with the CCM. EPA's attempt to create a hybrid cost estimate by selectively modifying the 2009 estimate resulted in cost estimates that were neither site-specific and real (like OG&E's 2009 cost estimates) nor pursuant to the CCM (like OG&E's

2008 cost estimates). EPA's approach to the cost estimates for the OG&E Units was, therefore, arbitrary and capricious.

Second, even if only the 2009 cost estimates were used to evaluate the cost effectiveness of scrubbers, Oklahoma's reliance on those site-specific estimates was proper. EPA's contrary conclusion is flatly inconsistent with its own recognition that "States have flexibility in how they calculate costs." 70 Fed. Reg. at 39,127. Where the RHR give States flexibility and Congress has designated those States to take the dominant role in determining BART, EPA is not free to undercut the State's reasonable exercise of that flexibility.

EPA illegally usurped State authority in violation of the plain language of the Act when it rejected Oklahoma's BART determination for the OG&E Units and, thus, the FIP is unlawful.

B. EPA improperly proposed a FIP prior to taking final action on the Oklahoma SIP and after the two-year window for promulgating a FIP under the CAA.

EPA's issuance of the Oklahoma FIP was also procedurally defective. First, the CAA does not give EPA authority to propose a FIP prior to final disapproval of the Oklahoma SIP. The Act, moreover, requires that EPA give Oklahoma a reasonable opportunity to cure any alleged defects in a disapproved SIP. CAA Section 110(c)(1)(A) allows promulgation of a FIP after EPA "finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under section (k)(1)(A) of this subsection or . . . disapproves a State implementation plan submission in whole or in part." 42 U.S.C. § 7410(c). Section 110(c) also states that EPA shall propose a FIP "unless the state corrects the deficiency," thereby reflecting Congress's intention for States to have the power to design their own SIP and have an opportunity to correct a SIP before a FIP is issued. *Id.* Simultaneous promulgation of the FIP is also inconsistent with the Act's definition of a FIP. A FIP is defined as a plan "to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation

plan." 42 U.S.C. § 7602(y). Thus, a FIP cannot properly exist until after final action has been taken on a State's SIP.

CAA § 307(d)(3) also requires that "[t]he statement of basis and purpose" that must accompany each proposed FIP include a summary of "the factual data on which the proposed rule is based" and "the major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d)(3)(A), (C). EPA cannot credibly claim to be able to present the relevant factual, legal, and policy information and rationale to justify a proposed FIP before it has: (1) determined whether and to what extent the Oklahoma SIP may be deficient and unapprovable; (2) provided the public with an adequate explanation of any such determination in a proposed EPA rule on SIP approval or disapproval that is published for public review and comment; (3) received, considered, and responded to public comments on the proposed action; and (4) made a final determination and taken final action to disapprove the SIP in whole or in part.

By intermingling its justification for rejecting Oklahoma's SIP with its stated grounds for promulgating a FIP, EPA attempts to side-step its burden of proof to justify a rejection of Oklahoma's BART determinations. For example, in making its BART determinations, ODEQ concluded that the site-specific cost information submitted by OG&E in 2009 was "credible, detailed, and specific for the individual facilities," going "well beyond the default methodology recommended by EPA guidance." Oklahoma SIP at § VI(C). EPA, however, rejected a number of site-specific costs that Oklahoma agreed with, such as labor productivity, overtime inefficiencies, and owner's costs, concluding that they were "likely" included in other areas. *See* Response to Technical Comments for Sections E through H, EPA ID No. EPA-R06-OAR-2010-0190-0057 (dated Dec. 13, 2011) ("Response to Comments"). EPA's speculations, however, do not satisfy its burden to demonstrate that Oklahoma failed to engage in the process specified by

the CAA and RHR.[4] It also does not mean that *Oklahoma*, as the primary decision-maker for BART, acted unreasonably in the way it included these costs in its analysis. EPA's speculative approach is irrelevant to the issue of whether Oklahoma considered and balanced the required BART factors. By combining the review of the Oklahoma SIP and the promulgation of the Oklahoma FIP, EPA blurs the important distinction in the scope of its authority with respect to the cost analysis, contrary to the regime established by the CAA.

To the extent the simultaneous promulgation of the Oklahoma FIP was driven by the perceived consent decree deadline in *WildEarth Guardians v. Jackson*, No. 4-09-CV-02453-CW (N.D. Cal. 2009), that only serves to buttress the procedural errors committed by EPA. It demonstrates that EPA rushed a FIP for reasons unrelated to the CAA or RHR without giving the Oklahoma SIP and the comments on its Proposed Rule fair and due consideration.

Second, because EPA published a notice that States, including Oklahoma, had failed to meet the statutory deadline for submitting regional haze SIPs, it is undisputed that the CAA unequivocally imposes a two-year requirement for EPA to take such action. *See* 42 U.S.C. § 7410(c); *General Motors v. United States*, 496 U.S. 530, 537 (1990) (citing CAA § 110(c) as example of "explicit deadlines" established by the CAA). It is also undisputed that EPA failed to promulgate a FIP within that two-year window. Thus, EPA's attempt to promulgate the Oklahoma FIP outside that two-year window, without first providing a new notice to re-open the two-year window for doing so, was contrary to the Act.

[4] As another example, EPA "assumes" a 5% "multiple unit discount," without any showing that such a discount was not already reflected in the vendor quotes in the 2009 cost estimates or, more importantly, that such a discount would likely be achievable. Again, while EPA may be able to include such a discount for purposes of its own cost analysis in proposing a FIP, EPA has no basis to reject the Oklahoma SIP based on such speculation or Oklahoma's reasonable conclusion that OG&E's cost estimates were sufficiently detailed and credible for purposes of the Oklahoma SIP.

C. EPA's rejection of the 2008 and 2009 cost estimates is arbitrary and capricious.

As previously noted, Oklahoma has the primary authority to determine BART and, pursuant to EPA's own guidelines, this primacy extends to the cost analysis, where the State is given "flexibility in how [it] determines costs." 70 Fed. Reg. at 39,127. Oklahoma's cost analysis, set forth in the Oklahoma SIP, clearly meets statutory requirements. Even if EPA was authorized to second guess Oklahoma's judgment, EPA has not articulated any sound or reasonable basis for rejecting Oklahoma's considered judgment regarding the appropriate costs to consider. Indeed, EPA's own cost analysis is internally inconsistent, arbitrary, speculative and unsound.

1. EPA's failure to accept the 2008 cost estimate is unjustified.

In May 2008, OG&E submitted BART evaluations, including cost estimates for installing and operating scrubbers at the OG&E Units, which were prepared according to the CCM. In November 2008, EPA sent a letter to ODEQ in which EPA acknowledged that "OG&E did utilize the 'EPA Air Pollution Control Cost Manual' when constructing its [May 2008] cost estimates." *See* OG&E Comment, Ex. A; *see also* Oklahoma SIP, App. 6-4. The 2008 cost estimates showed that the costs of scrubbers per ton of SO_2 removed for the OG&E Units would be more than ten times the average costs per ton expected by EPA for this technology and nearly five times as much as the upper limit of EPA's expected cost range. *See* 70 Fed. Reg. at 39,132 (estimating an average cost of $919 per ton and a cost range of $400 to $2,000 per ton of SO_2 removed).

After the 2008 estimates were finalized and updated in September 2009,[5] EPA and ODEQ asked for vendor quotations and other site-specific information to supplement and address questions regarding the outcome of the prior CCM analysis. OG&E complied with the

[5] The 2008 cost estimates were updated in September 2009 to reflect the use of annual actual baseline emissions for the 2004-2006 periods, as required by EPA, but this did not alter the total annual costs of control contained in the original May 2008 estimates.

request for information and detail beyond that required by the CCM and submitted site-specific cost estimates in December 2009. Although OG&E used the cost categories prescribed by the CCM to develop the 2009 cost estimates, their site-specific nature meant that they could not achieve the CCM's primary objective of national comparability for costs of control equipment at one facility to costs of similar equipment at another facility, a fact which OG&E pointed out in its comments to the proposed Oklahoma SIP. *See* OG&E Comment at 25.

Under these circumstances, it is clear that EPA's rejection of the 2009 estimates for allegedly failing to follow the CCM is arbitrary and designed to achieve its predetermined judgment that scrubbers should be specified as BART for the OG&E Units. Not only does EPA's decision rest on a faulty analysis of the 2009 cost estimates, as discussed below, but EPA completely and improperly ignored the 2008 cost estimates that, in full accordance with the CCM (as even EPA admitted), independently demonstrated that scrubbers are not cost effective. EPA's inconsistent positions regarding the nature of the cost estimates necessary for the BART analysis for the OG&E Units illustrates the arbitrariness of the Final Rule.

2. EPA's Option 1 disregarded the BART guidelines by failing to use baseline actual emissions to determine cost effectiveness.

Pursuant to EPA's own guidance, which Oklahoma was required to follow, the amount of a pollutant that a device will control on an annual basis must be determined using past actual emissions from the source and projections of future emissions following installation of a particular control technology. The purpose of using past actual emissions as the baseline is to provide a realistic depiction of the amount of a pollutant that a device will actually control. 70 Fed. Reg. 39,167. EPA has, in fact, revised cost effectiveness calculations in other BART determinations to ensure that emission reductions are calculated this way. *See, e.g.*, 74 Fed. Reg. 44,313, 44,321 (Aug. 28, 2009). Use of this consistent calculation methodology helps to achieve the national uniformity that EPA seeks in the regional haze context.

EPA argues in the Final Rule that the "RHR states that when differences from 'past practice' have 'a deciding effect in the BART determination, you must make these parameters or assumptions into enforceable limitations,' and the OG&E analysis does not propose making the basis of their reductions enforceable." Response to Comments at 6. EPA's argument misses the mark in two significant ways. First, EPA is simply wrong that the emissions reductions used as the basis for OG&E's calculations are not made enforceable. To the contrary, the Oklahoma SIP finds that low sulfur coal is BART and specifically requires OG&E to continue burning that fuel in the future. Accordingly, OG&E's analysis (unlike EPA's) represents the real actual emission reductions that could be expected with the controls installed. EPA's contrary argument is circular and nonsensical.

Second, EPA's argument reflects the flawed assumption at the heart of EPA's Option 1, *i.e.*, that one must combine the OG&E-sized unit with higher sulfur coal or there is a mismatch. It is that fundamental engineering error that leads EPA – not OG&E or Oklahoma – to depart from past practices and *assume* that OG&E burns a much higher sulfur coal than it actually does (thereby removing more SO_2 and lowering the $/ton of pollutant removed). Moreover, even if OG&E did switch to a higher sulfur coal following scrubber installation, that would be irrelevant to a proper cost analysis. Cost effectiveness is based on the amount of SO_2 reduction when comparing emissions pre- and post-control. For example, if an emitter emits 10,000 tons per year ("tpy") of SO_2 pre-control and 2,000 tpy of SO_2 post control, the amount of SO_2 controlled is 8,000 tpy because that is the reduction in pre-control emissions. The reduction in pre-control emissions remains the same even if a scrubber actually captures 18,000 tpy of SO_2 because the emitter burns a higher sulfur coal following control installation. The sulfur content of a particular coal is simply irrelevant to a proper cost analysis.

3. EPA's Option 2 demonstrates a profound lack of engineering judgment and skill.

EPA disregarded sound engineering principles by reducing the scrubber size in Option 2. This fundamental error reflects EPA's lack of understanding of the engineering and operational processes at issue. Scrubber size is dependent upon gas flow, not the sulfur content of a particular coal. A scrubber must be sized to reflect the maximum potential heat input from the facility, and that number is essentially the same whether a facility burns high or low sulfur coal. The reduced scrubber size reflected in EPA's Option 2 is not technically feasible and, if used, would effectively de-rate the OG&E facilities by significantly diminishing their electrical generating capacity, thereby impeding their ability to meet the supply requirements for OG&E's customers and for the SPP. Option 2, therefore, is not a valid analysis because EPA guidance requires the elimination of technically infeasible options. *See* 40 C.F.R. Pt. 51, App. Y(II)(A); Proposed Regional Haze Regulations, 69 Fed. Reg. 25,184, 25,186 (May 5, 2004).

4. EPA's paid consultant is not qualified to opine on the cost effectiveness of scrubbers at the OG&E facilities.

EPA's reliance on Dr. Phyllis Fox for its cost analysis is due no deference here because she, unlike Sargent & Lundy ("S&L") who worked with OG&E in the preparation of its cost estimates,[6] is not qualified and lacked foundation to analyze the engineering requirements of a retrofit scrubber system at the OG&E Units. Dr. Fox's conclusions are unreliable because she lacks the knowledge, skill, experience, training, and education to proffer opinions on the projected costs and visibility impact of installing and operating scrubbers at the OG&E Units. She has never designed, installed, or operated a scrubber and has never visited the OG&E Units.

[6] S&L, unlike Dr. Fox, is well qualified to perform the cost analysis for the Muskogee and Sooner Units. S&L has decades of experience providing comprehensive consulting, engineering, design, and analysis for electric power generation, specifically in the area of retrofit and environmental compliance projects. To develop both the 2008 and 2009 cost estimates, S&L reviewed OG&E data and information in detail to gain an understanding of the facilities. As part of this effort, S&L engineers visited the Muskogee and Sooner Generating Stations numerous times so as to understand the specific design and engineering aspects of the affected units and the overall facilities.

While Dr. Fox's curriculum vitae reflects her experience as a consultant and witness on various environmental litigation topics, including permitting and condemnation cases, her vitae establishes her lack of experience evaluating the costs of installing and operating pollution control equipment, let alone as retrofit technology at EGUs. Dr. Fox is not qualified, and certainly not more qualified than OG&E or Oklahoma, to properly evaluate the cost effectiveness of scrubbers at the OG&E Units.

Dr. Fox's analysis, adopted and endorsed by EPA in the Final Rule, also lacks adequate foundation. Dr. Fox concedes throughout her report that she lacked information relied on by ODEQ to reach its conclusions, but nonetheless she offered opinions contrary to those conclusions. For example, she acknowledged that because she did not see the parties' spreadsheets disclosing cost calculations, she was unable to perform a complete analysis. *See* Response to Comments at 13. Dr. Fox also appeared to lack relevant knowledge about the OG&E Units and the facilities at which these units are located. Dr. Fox did not attempt to meet, or even communicate, with OG&E or S&L about the particular design parameters, engineering specifications, or other intricacies associated with the OG&E Units. Indeed, Dr. Fox did not visit either the Muskogee or Sooner Generating Stations. Because Dr. Fox was admittedly missing information that is vital to a complete and accurate analysis, her analysis is without sufficient foundation and unreliable, and EPA's reliance on that analysis was arbitrary and capricious.

5. EPA has failed to show that Oklahoma did not follow CCM guidelines in evaluating the 2009 cost estimates, relying for the first time in the Final Rule on the "overnight cost" method.

In analyzing EPA's approach to the cost analysis for the OG&E Units, EPA's disapproval of portions of the Oklahoma SIP and EPA's promulgation of the Oklahoma FIP must be considered separately. Unless EPA was justified in rejecting the SO_2 portions of the Oklahoma SIP for the OG&E Units, it had no authority to issue the FIP. Thus, for purposes of reviewing

EPA's action with respect to the Oklahoma SIP, EPA's evaluation of specific cost factors as part of its promulgation of the Oklahoma FIP is irrelevant. The issue is whether Oklahoma's approach in devising the SIP comported with the statutory requirements. Fundamentally, of course, Oklahoma's conclusion that scrubbers were not cost effective is fully supported by the 2008 cost estimates, which EPA conceded were developed consistent with the CCM but refused to consider in connection with the disapproval of the SIP. Even with respect to the 2009 site-specific cost estimates, a review of the Oklahoma SIP demonstrates that ODEQ's consideration of those costs was justified and reasonable. Given Congress's deference to the States to make these judgments, the issue should be settled.

EPA, however, attacks Oklahoma's judgment, asserting that Oklahoma did not apply the so-called "overnight" cost method—a method not previously referred to or applied by EPA in connection with the Proposed Rule, in other BART determinations, or in the context of the RHR. *See* 76 Fed. Reg. at 81,744. EPA's failure to raise this approach as justification for its proposed actions in the Proposed Rule deprived Petitioners of the right and opportunity for comment and was, therefore, improper under the APA. The cost of scrubbers, and the method of determining those costs, are at the core of EPA's Final Rule, both in disapproving the Oklahoma SIP and in justifying the requirements of the Oklahoma FIP. Thus, reconsideration is appropriate.

Contrary to EPA's assertion, the CCM does not require parties to use the "overnight" cost method, and EPA candidly admits that the CCM never uses the terminology "overnight cost." *See* Response to Comments a 9. Indeed, in support of the Proposed Rule, EPA claimed that the CCM required compliance with a "constant dollar" approach, which was (as explained in the OG&E Comment) the method utilized in the 2009 site-specific cost estimates. *See* Revised Cost Effectiveness Analysis for Flue Gas Desulfurization, Doc. ID No. EPA-R06-OAR-2010-0190-

0006, dated Oct. 6, 2010, at 9-12. The constant dollar methodology allows comparability by removing the effects of inflation.

EPA's newly minted phraseology is inconsistent with the CCM, its own past regulatory practices, and the BART cost effectiveness analysis of others. It represents an entirely new approach to calculating costs for purposes of RHR BART determinations. For example:

- Rather than an "overnight cost" analysis, the constant dollar approach required by the CCM annualizes (in constant dollars) the costs of installation, maintenance, and operation of the air pollution control device over the life of the system, and the CCM recommends translating the costs in each future year to year zero using an equivalent uniform annual cash flow method. The 2009 cost estimates followed this approach.

- Section 2.3 of the CCM sets forth cost categories that specifically include "total capital investment." Total capital investment is defined to "include *all* costs required to purchase equipment needed for the control systems . . . ." (emphasis added). *See* CCM, Doc. ID No. EPA-RO6-OAR-2010-0190-0060.

- Sections 2.4.1 and 2.4.2 of the CCM address accounting for the time value of money, and real, nominal and social interest rates, stating that "removing the inflation adjustment from the nominal interest rate yields the real rate of interest – the actual cost of borrowing." *Id.*

- While EPA cites to the U.S. Energy Information Administration ("EIA") as presenting projected plant costs in terms of overnight costs in its Response to Comments, this is not accurate. The EIA document cited by EPA states that "[e]stimates of the overnight capital cost of generic generating technologies *are only the starting point for consideration of the cost of new generating capacity in EIA modeling analyses*." EIA Updated Capital Cost Estimates for Electricity Generation Plants, dated Nov. 2010, at 4 (available at http://www.eia.gov/oiaf/beck_plantcosts/pdf/updatedplantcosts.pdf). Footnote 2 of the EIA document states in full: "'Overnight cost' is an estimate of the cost at which a plant could be constructed assuming that the entire process from planning through completion could be accomplished in a single day. This concept is useful to avoid any impact of financing issues and assumptions on estimated costs. *Starting from overnight cost estimates, EIA's electricity modeling explicitly takes account of the time required to bring each generation technology online and the costs of financing*

construction in the period before a plant becomes operational." *Id.* at 2 (emphasis added).

- Not only is the CCM silent as to the "overnight cost" approach trumpeted for the first time here by EPA, but to the contrary, the CCM recognizes that "utilities ... generally employ a process called 'levelized costing' that is different from the methodology used here." *See* CCM Sec. 1.1 n.1. Unlike the "overnight cost" method, the "levelized costing" approach is consistent with the "constant dollar" approach employed by OG&E.

- Although EPA claims that it has long been its practice to exclude AFUDC from regulatory cost effectiveness analysis, EPA's website indicates that "EPA uses the Integrated Planning Model (IPM) to analyze the projected impact of environmental policies on the electric power sector in the 48 contiguous states and the District of Columbia." (http://www.epa.gov/airmarket/progsregs/epa-ipm/) EPA further notes that "IPM can be used to evaluate the cost and emissions impacts of proposed policies to limit emissions of sulfur dioxide (SO2), nitrogen oxides (NOx), carbon dioxide (CO2), and mercury (Hg) from the electric power sector." *Id.* As part of the calculation of the capital cost factor, the IPM "increase[s costs] by another 10% to build in an Allowance for Funds used During Construction (AFUDC)" over a 3 year construction cycle. *Documentation for EPA Base Case v.4.10 using the Integrated Planning Model*, EPA #430R10010, Section 5.1.1 (August 2010).

- While EPA claims that the CCM requires use of the "overnight method" for comparability purposes, the reality is that EPA has not required application of the "overnight method" in connection with any other RHR BART cost effectiveness evaluations. Instead, prior to issuing the FIP, EPA consistently maintained that the CCM requires use of the "constant dollar" approach to estimating costs. *See, e.g.*, Technical Support Document for EPA's Proposed Action on North Dakota's Regional Haze and Transport State Implementation Plans, EPA Docket ID No. EPA-R08-OAR-2010-046-0076, dated Sept. 2011, attached hereto as Ex. B.

With respect to its treatment of owner's costs, engineering and procurement costs, and contingency, EPA does not argue that these costs are not allowable under either the "overnight cost" method or the constant dollar approach. Instead, EPA speculates that they must already be included in other cost numbers. *See* Response to Comments at 28-30. EPA has no basis—and states no basis—for saying that Oklahoma was not reasonable or justified in determining that the

3, 24, available at ftp://ftp.epa.gov/r8/regionalhaze/ColstripAddendum.pdf), combined and attached hereto as Ex. D.[7]

EPA's selective reliance on industry publications (rather than the CCM) and its inexplicable departure from past practices in calculating the useful life for the OG&E Units is arbitrary and capricious. Moreover, EPA has no sound technology based reason to reject ODEQ's determination that a 20-year useful life for the controls on the OG&E Units, made in accordance with the CCM and other guidance.

In the end, EPA has not and cannot show that Oklahoma's cost analysis is inconsistent with CCM guidelines. The CCM itself recognizes that states have flexibility in the cost analysis employed, and Oklahoma appropriately exercised that flexibility.[8] Whether EPA would have exercised its judgment differently does not justify its disapproval of the Oklahoma SIP.

6. EPA's "visibility improvement" analysis employs a new "number of days" approach to visibility improvement.

EPA's visibility improvement analysis in the Final Rule, for the first time, reflects a "number of days" approach to visibility improvement. 76 Fed. Reg. at 81,736. Again, because this approach was not raised by EPA in the Proposed Rule, Petitioners are entitled to reconsideration. Moreover, EPA does not and cannot suggest that this new approach is required by published EPA guidance or the CAA. In contrast, EPA acknowledges that the $/deciview metric used by Oklahoma in the Oklahoma SIP is an optional cost effectiveness measure that can be used consistent with BART guidelines. *Id.* at 81,747. In short, EPA has no proper basis under the Act to reject Oklahoma's reasoned judgment to consider the $/deciview metric consistent with BART guidelines and to substitute an entirely new and different metric for the

[7] *See also* Letter from Callie A. Videtech, Director, Air and Radiation Program, to James Parker, Manager, Compliance Services (Corette Generating Station), at 3, available at www.epa.gov/region8/air/pdf/coretteepaltr.pdf, included in Ex. D.

[8] As is apparent from the discussion above of EPA's approach to just some of the cost items, EPA's cost analysis reflects the procedural flaw that EPA has created by failing to first address the Oklahoma SIP before trying to justify its own analysis for purposes of a FIP.

first time in the Final Rule. EPA's action once again is not only defective procedurally under the APA, but demonstrates the impropriety of commingling its SIP review and FIP promulgation, resulting in EPA failing to provide the statutorily required deference to Oklahoma. EPA further compounded this error by failing to provide an analysis of the SIP controls using the new FIP metric. As a result, it is impossible to determine how much visibility improvement is attributable to scrubbers and how much is attributable to the use of low sulfur coal.

For each of the foregoing reasons, the Final Rule is invalid, Petitioners are entitled to reconsideration, and Petitioners are likely to succeed on the merits of their challenges.

II. Petitioners Will Suffer Irreparable Harm Absent a Stay

EPA's FIP became effective on January 27, 2012 and requires compliance with the established emission limits through the installation of four scrubbers (the "Scrubber Project") within five years—by January 27, 2017.

A. The State faces irreparable harm without a stay.

As noted above, Congress designated the State as the principle decision maker for BART determinations and regional haze programs. EPA's actions here deprive Oklahoma of the ability to fashion a regional haze program that balances costs and visibility improvement in a manner that is appropriate for the citizens and economy of this State. Compelling OG&E to proceed while the Court of Appeals reviews EPA's actions here undermines the State's authority and damages the ability of Oklahoma to fulfill its regulatory function as created by Congress. OG&E has detailed—and the State has agreed with—the immediate and short term economic costs resulting from the need to meet the existing five-year compliance deadline. To the extent those costs are passed through to consumers in Oklahoma, the increased electricity rates will have an adverse economic impact throughout Oklahoma, as consumers pay higher rates directly and businesses look to pass their higher costs through to their customers. As a large electricity

consumer, the State too will feel the economic impact of higher rates directly. Neither the State nor its citizens has recourse for such unnecessary costs.

B. OG&E faces irreparable harm without a stay.

The compliance deadline established in the Oklahoma FIP places OG&E in an untenable position. OG&E cannot wait until its judicial challenge to the Final Rule has been finally determined before commencing the Scrubber Project because OG&E could not, under those circumstances, meet EPA's five-year compliance deadline. Rather, OG&E must undertake immediate steps to procure the goods and services necessary to implement the Scrubber Project or risk non-compliance. The end result is that OG&E and its customers will incur significant costs associated with the FIP. However, these costs are not recoverable from EPA if the Final Rule is ultimately found to be invalid. Thus, OG&E will suffer irreparable harm if the FIP's compliance deadlines are not stayed pending judicial review.

As noted above, the APA specifically provides that an agency may postpone the effective date of an agency action pending judicial review. 5 U.S.C. § 705. Courts, when considering a stay of agency action pending judicial review, apply the same test as that applied to a motion for preliminary injunction. *Corning Savings & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 562 F. Supp. 279, 280 (E.D. Ark. 1983). One component of this test for injunctive relief is irreparable harm and the inadequacy of legal remedies. *Sampson v. Murray*, 415 U.S. 61, 88 (1974). Courts evaluate three factors when evaluating the harm that will occur, both if the stay is granted or not: (1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided. *Cuomo v. United Nuclear Regulatory Comm'n*, 772 F.2d 972, 997 (D.C. Cir. 1985). As further discussed below, OG&E will suffer irreparable harm if the FIP compliance deadlines are not stayed pending judicial review.

The Scrubber Project will be a massive construction effort requiring extensive planning and logistical coordination. Johnson Aff. ¶ 9. OG&E's engineering consultants have performed cost estimates demonstrating that the cost of the Scrubber Project will range between $1.2 billion and $1.5 billion, with a resultant increase in annual Operating & Maintenance costs of between $70 million and $150 million. *Id.* Certainly if scrubbers must be installed on four separate units at two generation stations, the timing of the installation will need to be coordinated to ensure that OG&E can meet its load requirements during the protracted construction period when the units under construction will not be available to generate electricity. Because of this need to stagger the construction interruption for each of the four units, OG&E must begin promptly the steps necessary to comply with the FIP. Indeed, OG&E would have to immediately commence permitting efforts and the contracting process for engineering, equipment fabrication, and construction. Site mobilization for construction activities on the first unit would need to begin no later than October 2013. Activities that will necessarily have to occur in the first 24 months include:

- preparing design criteria, developing preliminary equipment general arrangement and site arrangement drawings, and engineering studies;
- developing system specification for bid, bid period, evaluation, selection, and negotiation of contract(s);
- initiation of air permit modifications, and other permits related to FGD system;
- detailed engineering for ductwork design, piping, electrical, substructure, and preliminary piping and instrumentation diagrams;
- equipment procurement for baghouse, booster fans, switchyard upgrades, ductwork, structural steel, auxiliary transformers, switchgear, control system, and dampers;
- commencement of manufacturing/fabrication;
- general work contracts; and

- site mobilization and preparatory work to construct/install equipment at the physical site of the first scrubber installation.

Costs for activities during the first year are estimated at 3% of total project and second year costs are estimated at 14% of total project. Thus, OG&E will have expended, in good faith, as much as $30 million dollars in the first year alone, and another $200 million if extended through two years, preparing for the installation of scrubbers.

It is apparent that the Scrubber Project will result in very significant capital investment costs, some of which OG&E will seek to recover from its customers. This recovery will impact OG&E's energy rates and therefore, necessarily, the size of its customers' monthly bills. OG&E estimates that the earliest likely period for possible resolution of its challenge to EPA's Final Rule in the Tenth Circuit is two years, but the appeal could extend into 2014, increasing the pre-decision expenditures to well over $200 million.

OG&E and its customers will suffer irreparable harm because there is no mechanism for them to recover the Scrubber Project costs from EPA if the Final Rule is found to be invalid. This presents a situation analogous to where a party is subject to monetary damages that are not otherwise recoverable. Courts have held that "[i]mposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (citing *Chamber of Commerce v. Edmonson*, 594 F.3d 742, 770-71 (10th Cir. 2010)). In *Crowe & Dunlevy*, the Tenth Circuit upheld the district court's grant of a preliminary injunction relieving the law firm from having to return a portion of fees from an Indian tribunal client. The Court recognized the irreparable harm that would result because, though the main injury would be financial, it could not be remedied by legal means because the Indian tribunal client has sovereign immunity and could not later be compelled to repay the fees. *Id.* at 1157-58.

III. The Balance of Equities Favors Granting Petitioners' Stay Request, and Granting a Stay Is in the Public Interest

The balance of equities and the public interest strongly support granting Petitioners' stay request pending completion of judicial review of the Final Rule. The Tenth Circuit, of course, will ultimately determine the validity of the Final Rule. For these purposes, however, balancing the equities focuses on a comparison of (i) the effects of keeping the Final Rule's compliance deadline in place pending review and assuming that the Final Rule is eventually overturned, with (ii) the effects of suspending the effective date and compliance deadline in the Final Rule pending review and assuming that the Final Rule is eventually affirmed. In the context of regional haze, this should not be a close call.

If the FIP and its compliance deadline remain effective and the Final Rule is overturned, Petitioners have already demonstrated the substantial economic impact that would have on the State, OG&E, and/or its customers. OG&E will be required to expend significant resources immediately in order to implement the Scrubber Project with any chance of meeting the five year deadline, and just in the first two years, the costs will total approximately $200 million. Even if OG&E were able to absorb those costs into its rate structure, this will have an obvious adverse effect on the citizens of Oklahoma and Arkansas who have to pay those higher electricity rates. In today's economic climate, those very real economic impacts of EPA's FIP cannot and should not be ignored.

Aside from the economic consequences of EPA's decision, a stay of the effective date of the FIP would also reflect an appropriate respect for State sovereignty as embodied in the regional haze provisions of the CAA and the RHR. While EPA has indicated its disagreement with Oklahoma's BART determinations with respect to the OG&E Units, Congress's unquestioned intent to make the States the lead entity in designing regional haze programs counsels in favor of a stay where EPA has taken the extraordinary step of rejecting Oklahoma's

exercise of that Congressional authority and substituted its own conclusions in the place of the State's considered judgment. Moreover, a stay would in some small part give the affected parties and EPA the opportunity to disentangle the error created by EPA's consideration of the Oklahoma SIP from its promulgation of the Oklahoma FIP, particularly if EPA also grants Petitioners' request for reconsideration. *See* 42 U.S.C. § 7410(c) (requiring final action on a SIP as predicate for promulgation of a FIP).

On the other hand, granting Petitioners' stay request will have no negative consequences. Congress has established the goal for the regional haze program to be achieving "natural visibility conditions by the year 2064." *See* 40 C.F.R. § 51.308(d)(1)(i)(B). Even if the Final Rule is ultimately upheld, a 2-3 year delay in the effective date of the FIP portion of the Final Rule pending judicial review will not interfere with achieving the Congressional objective for visibility. Indeed, despite the fact that Congress first adopted the regional haze statutory provisions in 1990, EPA itself delayed taking action to formulate the RHR for almost ten years. *See* 64 Fed. Reg. 35,714 (July 1, 1999). The absence of a negative impact on visibility from a delay in the compliance deadline for the FIP is particularly apparent here where EPA acknowledges that Oklahoma and the OG&E Units in particular have no perceptible impact on visibility even today.

Importantly, the regional haze statutory provisions and the RHR do not address matters of public health. Instead, the regional haze program is designed for the prevention and remedying of impairment of visibility in national parks and other public lands. *See* 42 U.S.C. § 7491(a)(1). Thus, delaying the effective date of the FIP does not create any health risks to the public, much less risks that would justify compelling immediate capital projects that will be expensive and disruptive of the State economy and OG&E's electric generating operations. *See, e.g., Tate Access Floors, Inc. v. Interface Architectural Res., Inc.*, 279 F.3d 1357, 1364 (Fed. Cir. 2002)

(noting the absence of a public health threat as a significant factor favoring a preliminary injunction).

CONCLUSION

For the foregoing reasons, Petitioners' request for reconsideration and for an administrative stay of the compliance deadlines with respect to the Oklahoma FIP pending judicial review of the Final Rule should be granted.

Dated: February 24, 2012

Respectfully submitted,

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ATTORNEYS FOR PETITIONER STATE OF OKLAHOMA, EX REL., E. SCOTT PRUITT

Respectfully Submitted,

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Leavy, Jacqueline

From: Zak J Ritchie [zak.j.ritchie@wvago.gov]
Sent: Friday, February 21, 2014 5:04 PM
To: Mccarthy, Gina
Subject: Request for withdrawal and re-proposal (EPA-HQ-2013-0495)
Attachments: Letter to EPA re NSPS (2 21 24).pdf

Dear Administrator McCarthy:

Please see the attached letter from the Attorneys General of the States of West Virginia, Alabama, Kansas, Nebraska, Ohio, Oklahoma, South Carolina, Texas, and Wyoming regarding the proposed standards of performance for greenhouse gas emissions from new stationary sources.

A hard copy will follow by mail.

Thank you,
J. Zak Ritchie

--
J. Zak Ritchie
Assistant Attorney General
Office of the West Virginia Attorney General
1900 Kanawha Boulevard, East, Room 26-E
Charleston, WV 25305
Phone: 304-558-2021
Fax: 304-558-0140

State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

February 21, 2014

Via Certified Mail, Email & Regulations.gov (EPA-HQ-2013-0495)
The Honorable Gina McCarthy
Administrator
U.S. Environment Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
McCarthy.Gina@EPA.gov

Re: Request for withdrawal and re-proposal (EPA-HQ-2013-0495)

Dear Administrator McCarthy:

This letter concerns the Environmental Protection Agency's ("EPA") failure to provide meaningful opportunity for public comment on additional documents only recently docketed to the proposed Standards of Performance for Greenhouse Gas Emissions From Stationary Sources: Electric Utility Generating Units ("NSPS"),[1] which was published in the *Federal Register* on January 8, 2014.[2] In particular, the Notice of Data Availability ("NODA") and accompanying Technical Support Document ("TSD") were only docketed on February 6, *and neither has yet been published in the Federal Register*.[3] Despite this late docketing, EPA has not extended the period for public comments on the underlying proposal, which remain due by March 10, 2014. The public has barely a month to review and comment on one of the most wide-ranging and unprecedented rules ever to have been issued by a federal agency.

Section 307(d) of the Clean Air Act ("CAA") requires that upon publication, a proposal like the NSPS include a "statement of basis and purpose . . . [which] shall include a summary . . . [of the] . . . factual data on which the proposed rule is based, . . . the methodology used in obtaining the data and in analyzing the data, . . . [and the] major legal interpretations and policy

[1] 79 Fed. Reg. 1430 (Jan. 8, 2014).

[2] The Commonwealth of Kentucky has also made the same request in a previous letter to EPA.

[3] "Technical Support Document: Effect of EPAct 05 on BSER for New Fossil Fuel-fired Boilers and IGCCs, January 8, 2014", Docket No. EPA-HQ-2013-0495-1873, Feb. 6, 2014. The TSD is time-stamped January 8, 2014, but was not placed in the docket until February 6. Likewise, a pre-publication version of the NODA was not posted to the docket until February 6.

considerations underlying the proposed rule." 42 U.S.C. 7607(d). Critically, section 307(d) also requires that "[a]ll data, information, and documents . . . on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule." This was not done here.

Yet, EPA has only now released the NODA and TSD's full legal justification for the proposed NSPS, *more than halfway through the proposal's comment period ending on March 10, 2014*. These documents contain *new* technical information and legal interpretations addressing how EPA believes facilities can be considered under the proposed NSPS despite statutory prohibitions in the Energy Policy Act of 2005 to the contrary. The NODA and TSD make clear that the new information includes "major legal interpretations and policy considerations underlying the proposed rule" and addresses new "data, information and documents." Deprived of these documents, the notice of proposed rulemaking published on January 8 "fail[ed] to provide an accurate picture of the reasoning that has led [EPA] to the proposed rule." *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530–31 (D.C. Cir. 1982). This is particularly true where, as here, the proposal overhauls the electric generating sector on an unprecedented scale. *See Maryland v. Envtl. Prot. Agency*, 530 F.2d 213, 222 (4th Cir. 1975) (vacating rule due to EPA's failure to comply with notice and comment requirements, emphasizing the "drastic impact" that compliance with rule would have), *vacated on other grounds*, 431 U.S. 99 (1977).

The simultaneous comment deadline for the NODA and TSD provides insufficient time for stakeholders to meaningfully analyze and formulate comments not only on the proposed NSPS, but now also the NODA and TSD individually and as they relate to the proposal. In short, EPA is leaving the public with *less than a month* to not only complete comments on the proposal, but also fully analyze and provide comments on the 27 additional issues raised by the TSD. Forcing States and stakeholders to draft comments on the proposed NSPS, as well as the NODA and TSD by March 10, 2014, is unreasonable and will burden states. *See Conn. Light & Power Co.*, 673 F.2d at 530–31 ("An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.").

Moreover, this failure to comply with section 307(d) places any final rule in serious legal jeopardy. *See Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 540 (D.C. Cir. 1983) ("late docking [is] highly improper" and "prohibit[ed]. . . in no uncertain terms"); *Sierra Club v. Costle*, 657 F.2d 298, 396–400 (D.C. Cir. 1981) ("If . . . documents . . . upon which EPA intended to rely had been entered on the docket too late for any meaningful public comment . . . , then both the structure and spirit of section 307 would have been violated."); *see also Conn. Light & Power*, 673 F.2d at 530–31 ("If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals."); *Kennecott Corp. v. EPA*, 684 F.2d 1007, 1019 (D.C. Cir. 1982) (EPA improperly placed economic forecast data in the record only one week before issuing its final regulations); *Doe v. Rumsfeld*, 341 F. Supp. 2d 1 (D.D.C. 2004) (vacating rule because agency "deprived the

public of a meaningful opportunity to submit comments and participate in the administrative process mandated by law").

To comply with section 307(d), EPA must withdraw and re-propose the proposed NSPS so that major legal interpretations and policy considerations in the NODA and TSD are "included in the docket on the date of publication of the proposed rule." 42 U.S.C. § 7607(d). Therefore, the undersigned States request EPA withdraw and re-propose the NSPS to comply with applicable law, and provide interested parties 90 days to review and comment on the re-proposal. If EPA declines to do so, we request that the comment deadline for the proposed NSPS be extended to 90 days after publication of the NODA in the *Federal Register*, to allow for adequate review and comment on the proposed NSPS along with and in light of the new supporting data and major legal interpretations in the NODA and TSD.

Sincerely,

Patrick Morrisey
West Virginia Attorney General

E. Scott Pruitt
Oklahoma Attorney General

Luther Strange
Alabama Attorney General

Alan Wilson
South Carolina Attorney General

Derek Schmidt
Kansas Attorney General

Greg Abbott
Texas Attorney General

Jon Bruning
Nebraska Attorney General

Peter Michael
Wyoming Attorney General

Mike DeWine
Ohio Attorney General

State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

February 21, 2014

Via Certified Mail, Email & Regulations.gov (EPA-HQ-2013-0495)
The Honorable Gina McCarthy
Administrator
U.S. Environment Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
McCarthy.Gina@EPA.gov

Re: Request for withdrawal and re-proposal (EPA-HQ-2013-0495)

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Sincerely,

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The Honorable Gina McCarthy
Administrator
U.S. Environment Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

20460

Gaines, Cynthia

From: Hamilton, Sabrina
Sent: Wednesday, November 19, 2014 9:17 AM
To: Gaines, Cynthia
Cc: Wachter, Eric; Livingston, Keith; Labbe, Ken
Subject: Please close AX-14-000-5601 and AX-14-000-7524

Cynthia,

These are the two controls we spoke about last night. They are lost in CMS since Gloria Hammond's account was closed. CMS will not allow me to import this email from Eric Wachter into the "Supporting Documents" section. Can you take over the controls and import this email for the record and close both controls? Thanks so much!

Sabrina

Sabrina Hamilton
Air and Radiation Liaison Specialist
and FOIA Coordinator
Office of Air and Radiation - Correspondence Unit
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue, N.W. (6101-A)
Washington, D.C. 20460
Tel: (202) 564-1083
Fax: (202) 501-0600

From: Wachter, Eric
Sent: Wednesday, November 12, 2014 11:23 AM
To: Stewart, Lori
Cc: Hamilton, Sabrina; Knapp, Kristien; Gaines, Cynthia
Subject: RE: Regarding two outdated controls

Hi, Lori,
Sure, go ahead and close these out. Please put these the pertinent portions of the below information in the notes section of the control when they are closed.
Thanks,
Eric

From: Stewart, Lori
Sent: Friday, November 07, 2014 6:07 PM
To: Wachter, Eric
Cc: Hamilton, Sabrina; Knapp, Kristien
Subject: Regarding two outdated controls

Eric, Sabrina brought to my attention two letters that apparently got lost in the CMS box of a Senior grantee who left the Agency last Spring. I think they both need to be closed out for the following reasons:

AX 14-000-5601 Patrick Morrisey and 7 other West Virginia Attorney Generals

- This incoming, dated February 21 requested a 90-day extension to the 111b proposal on new power plants. EPA signed an FR notice on February 26 that extended the comment period by 60 days. Therefore, although the

extension was not as long as requested, the FR notice was responsive to their request (and many others, I believe).
- Although it is unfortunate that a response was not sent (and I'll keep a closer eye on the overdue list going forward), sending a response now would only dredge up something that has long been resolved through the FR notice.

AX 14-000-7524 Wick Havens, Ozone Transport Commission

- The incoming transmit a resolution requesting that EPA adopt an OTC consumer product model rule as a national rule.
- I checked with Mike Koerber in RTP and he confirmed that OAQPS has had several discussions with OTC on this proposal and they understand it is not high on EPA's priority list, given constrained resources.
- Also, Wick Havens is no longer the OTC Director so a response would need to be sent to a different individual.

I am out on Monday and Wednesday, and back in the office on Thursday. Sabrina is out all of next week. I am cc'ing Kristien who will be here while I am away in case you want to discuss before Thursday. Thanks very much.

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

February 28, 2014

VIA CERTIFIED MAIL & E-MAIL

The Hon. Regina A. McCarthy
Office of the Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460
Email: mccarthy.gina@epa.gov

U.S. Environmental Protection Agency
GS Rule Guidance Comments
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460
Email: GSRuleGuidanceComments@epa.gov

Re: Draft Underground Injection Control (UIC) Program Guidance on Transitioning Class II Wells to Class VI Wells

Comments from the Attorneys General of the States of Oklahoma, Alabama, Michigan, Nebraska, South Carolina, Texas and Wyoming

Dear Administrator McCarthy:

We are writing to express our concern over the Environmental Protection Agency's (EPA) Draft Underground Injection Control (UIC) Program Guidance on Transitioning Class II Wells to Class VI Wells (Draft Guidance), issued in December 2013. The Draft Guidance proceeds from an inaccurate understanding of the authority of a Class VI regulator with respect to Class II wells and therefore unlawfully interferes with the authority granted to States under the UIC Program. We respectfully request that EPA resolve this fundamental flaw to protect vital sectors of our economy and preserve the well-being of the citizens and businesses of our States.

The Safe Drinking Water Act's (SDWA) UIC Program is intended to protect subsurface supplies of drinking water from the drilling and use of underground wells for various industrial activities. Under this program, oil and gas wells are classified as "Class II" wells, and, pursuant to the structure of the UIC Program and primacy agreements with EPA, our states – and not EPA

313 N.E. 21ST STREET • OKLAHOMA CITY, OK 73105 • (405) 521-3921 • FAX: (405) 521-6246

– serve as the primary regulators of Class II wells. Recently, EPA created a new class of wells under the UIC Program, known as "Class VI" wells, for the underground injection and storage of carbon dioxide (CO_2), primarily in connection with prospective carbon capture and storage (CCS) operations. *See* 75 Fed. Reg. 77230 *et seq.* (Dec. 1, 2010). *See also* 75 Fed. Reg. 75060 (Dec. 1, 2010).

Notwithstanding this new class of wells intended to accommodate the underground injection of CO_2, many oil and gas producers operating Class II wells have been injecting CO_2 for the past 40 years to manipulate well pressure and enhance the recovery of oil and gas. This process, commonly referred to as enhanced oil recovery (EOR), has been used in more than 10,000 wells, about 7,000 of which are currently active. EOR represents a critically important part of our states' and our country's energy infrastructure and plays an essential role in our nation's economic stability and energy security.

The Draft Guidance, arising from EPA's newly-created Class VI wells, is directed at the interplay between Class II and Class VI wells as it relates to underground CO_2 injection. But rather than provide clarity and avoid interfering with the production of oil and gas via EOR – which, again, we emphasize has been occurring for the past several decades without increased risk to drinking water and other subsurface assets – the Draft Guidance has introduced confusion and uncertainty into the oil and gas industry and failed to resolve the business community's outstanding issues with the UIC Program.

Specifically, the Draft Guidance indicates that a regulator in an EPA regional office overseeing Class VI wells (*i.e.*, the Class VI Director) has the authority to determine whether a Class II well at which EOR operations are occurring must "transition" to a Class VI well. This flies in the face of prevailing industry practice, as well as common sense. It also violates current law and the proper division of authority between EPA and states under SDWA.

As part of its rulemaking in 2010 creating the Class VI well category, EPA articulated a series of factors by which a Class II well with EOR operations could be reclassified a Class VI well, presumably to perform CCS-type operations instead. 40 C.F.R. § 144.19. This included such criteria as an increase in reservoir pressure within the injection zone, an increase in CO_2 injection rates, suitability of the Class II area of review delineation, the owner's or operator's plan for recovery of CO_2 at the cessation of injection, the source and properties of injected CO_2, and any additional site specific factors as determined by the regulator. *Id.* Many Class II permit holders communicated to EPA that these criteria were too vague and could lead to the reclassification of wells in which CCS was neither intended nor actually occurring. In response, EPA prepared and issued the Draft Guidance in December 2013.

The Draft Guidance correctly states that while CO_2 is stored underground during EOR operations in a Class II well, this alone does not require the transition of the Class II well into a Class VI well. To the contrary, EPA has plainly stated that EOR operations at a Class II well are not to be affected by the Class VI rule:

> Traditional ER projects are not impacted by this rulemaking and will continue operating under Class II permitting requirements. EPA recognizes that there may be some CO_2 trapped in the subsurface at these operations; however, if there is no increased risk to [underground sources of drinking water (USDW)], then these operations would continue to be permitted under Class II.

75 Fed. Reg., at 77245. The Draft Guidance properly reiterates this point, stating "[t]raditional EOR projects are not affected by the Class VI rulemaking and will continue to be permitted under Class II requirements." Draft Guidance, at 1.

But then the Draft Guidance goes on to describe scenarios in which a Class II well with EOR operations would need to be reclassified as a Class VI well, based on the unchecked increase in subsurface pressures caused by the injection of CO_2. This is blatantly inconsistent with prevailing practices in the oil and gas industry and contrary to law.

Under the UIC Program, our states are vested with authority to permit Class II wells with EOR for purposes of enabling the production of oil. As part of this, the state-level Class II Director reviews maximum and average injection pressures and other information to ensure that CO_2 injection will "not result in the movement of fluids into a USDW so as to create a significant health risk." Draft Guidace, at A-4-A-5. Class II regulations specify limits on injection pressures to prevent the movement of injection or formation fluids into a USDW or the fracturing of the confining zone. *Id.* at A-8. *See also* 40 C.F.R. § 146.23(a). The Class II framework is thus wholly competent to prevent unchecked increases in subsurface pressures during EOR operations and other traditional oil and gas production methods. The scenario described by EPA as a trigger for reclassification simply is not reflective of real world operating conditions.

The actual circumstance under which reclassification would occur, also described in the Draft Guidance, is where a Class II operator changes the primary purpose of the well from the production of oil to the maximal underground storage of CO_2 and, in so doing, changes its operations in such a way as to transcend the confines of the Class II regulatory structure and create an "increased risk to USDWs compared to traditional Class II operations using carbon dioxide." Draft Guidance, at ii. Importantly, this is not so easily done. A Class II permit holder cannot change from EOR to maximal CO_2 storage without accounting for numerous other interests and legal and business considerations. For example, its contractual obligations with land owners and/or subsurface rights holders would most likely need to be altered, if not renegotiated, to accommodate such a transition. Similarly, state laws intended to enable oil and gas production can, in certain circumstances, interfere or even prohibit the use of oil and gas wells for maximal CO_2 storage if future production would be inhibited.

But regardless, the Draft Guidance further complicates and confuses the situation by erroneously implying that the Class VI Director can, on his or her own volition, preempt the Class II Director and require the Class II permit holder to file for reclassification under ClassVI. This is not lawful. Allowing the Class VI Director to "second guess" the Class II Director and intervene seemingly on a whim violates EPA's own rules regarding state primacy and flagrantly impinges upon state authority. EPA cannot revoke a state's primacy unless it can show a failure to comply with applicable requirements. 40 C.F.R. § 145.34(b). These requirements prescribe a series of detailed steps EPA must follow in order to do so, including providing adequate notice to the state and allowing the state sufficient time to take corrective action.

Thus the Draft Guidance, in overtly implying that the Class VI Director is empowered to act unilaterally within an industry in which he or she lacks requisite experience – thereby exposing a Class II permit holder to the seemingly unbounded risk of being ordered, absent any

specific criteria, to apply for reclassification – is utterly and entirely beyond the bounds of EPA authority and carries the very real possibility of doing harm to our nation's energy infrastructure. Moving beyond the confines of a traditional Class II well with EOR operations to maximal CO_2 storage is not easily nor quickly done and implicates significant economic and other business considerations. Allowing the Class VI Regulator to intervene seemingly without basis adds an unconscionable level of uncertainty and risk to a mature area of industrial activity already well and thoroughly regulated.

For the foregoing reasons, we respectfully request you take immediate action to rectify this situation as the Draft Guidance is finalized and, additionally, through any other rulemakings as may be necessary under the UIC Program to eliminate this uncertainty and ensure strict adherence to applicable law.

Sincerely,

E. Scott Pruitt
Oklahoma Attorney General

Luther Strange
Alabama Attorney General

Greg Abbott
Texas Attorney General

Bill Schuette
Michigan Attorney General

Peter Michael
Wyoming Attorney General

Jon Bruning
Nebraska Attorney General

Alan Wilson
South Carolina Attorney General

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21ST
OKLAHOMA CITY, OK 73105

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The Hon. Regina A. McCarthy
Office of the Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460

20460

Fri Mar 07 11:52:43 EST 2014
Postell-Glover.Eliska@epamail.epa.gov
FW: Comments on Draft Underground Injection Control (UIC) Program Guidance on Transitioning Class II Wells to Class VI Wells
To: CMS.OEX@epamail.epa.gov

Eliska Postell-Glover

Office of Executive Secretariat

postell-glover.eliska@epa.gov

Room 2336 WJC-North

202.564.6967

From: Clayton.Eubanks@oag.ok.gov [mailto:Clayton.Eubanks@oag.ok.gov]
Sent: Friday, February 28, 2014 3:51 PM
To: Mccarthy, Gina; GSRuleGuidanceComments
Subject: Comments on Draft Underground Injection Control (UIC) Program Guidance on Transitioning Class II Wells to Class VI Wells

Dear Administrator McCarthy,

Attached please find a comment letter from the Attorneys General of the states of Oklahoma, Alabama, Michigan, Nebraska, South Carolina, Texas and Wyoming regarding the Draft UIC Program Guidance on Transitioning Class II wells to Class VI wells. Thank you for the opportunity to submit these comments and we look forward to your response to the States concerns as outlined in the letter.

Sincerely,

P. Clayton Eubanks
Deputy Solicitor General
Office of the Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105
Tel: (405) 522-8992
Fax:(405) 522-0085
clayton.eubanks@oag.ok.gov

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

February 28, 2014

VIA CERTIFIED MAIL & E-MAIL

The Hon. Regina A. McCarthy
Office of the Administrator
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460
Email: mccarthy.gina@epa.gov

U.S. Environmental Protection Agency
GS Rule Guidance Comments
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460
Email: GSRuleGuidanceComments@epa.gov

Re: Draft Underground Injection Control (UIC) Program Guidance on Transitioning Class II Wells to Class VI Wells

Comments from the Attorneys General of the States of Oklahoma, Alabama, Michigan, Nebraska, South Carolina, Texas and Wyoming

Dear Administrator McCarthy:

We are writing to express our concern over the Environmental Protection Agency's (EPA) Draft Underground Injection Control (UIC) Program Guidance on Transitioning Class II Wells to Class VI Wells (Draft Guidance), issued in December 2013. The Draft Guidance proceeds from an inaccurate understanding of the authority of a Class VI regulator with respect to Class II wells and therefore unlawfully interferes with the authority granted to States under the UIC Program. We respectfully request that EPA resolve this fundamental flaw to protect vital sectors of our economy and preserve the well-being of the citizens and businesses of our States.

The Safe Drinking Water Act's (SDWA) UIC Program is intended to protect subsurface supplies of drinking water from the drilling and use of underground wells for various industrial activities. Under this program, oil and gas wells are classified as "Class II" wells, and, pursuant to the structure of the UIC Program and primacy agreements with EPA, our states – and not EPA

313 N.E. 21ST STREET • OKLAHOMA CITY, OK 73105 • (405) 521-3921 • FAX: (405) 521-6246

– serve as the primary regulators of Class II wells. Recently, EPA created a new class of wells under the UIC Program, known as "Class VI" wells, for the underground injection and storage of carbon dioxide (CO_2), primarily in connection with prospective carbon capture and storage (CCS) operations. *See* 75 Fed. Reg. 77230 *et seq.* (Dec. 1, 2010). *See also* 75 Fed. Reg. 75060 (Dec. 1, 2010).

Notwithstanding this new class of wells intended to accommodate the underground injection of CO_2, many oil and gas producers operating Class II wells have been injecting CO_2 for the past 40 years to manipulate well pressure and enhance the recovery of oil and gas. This process, commonly referred to as enhanced oil recovery (EOR), has been used in more than 10,000 wells, about 7,000 of which are currently active. EOR represents a critically important part of our states' and our country's energy infrastructure and plays an essential role in our nation's economic stability and energy security.

The Draft Guidance, arising from EPA's newly-created Class VI wells, is directed at the interplay between Class II and Class VI wells as it relates to underground CO_2 injection. But rather than provide clarity and avoid interfering with the production of oil and gas via EOR – which, again, we emphasize has been occurring for the past several decades without increased risk to drinking water and other subsurface assets – the Draft Guidance has introduced confusion and uncertainty into the oil and gas industry and failed to resolve the business community's outstanding issues with the UIC Program.

Specifically, the Draft Guidance indicates that a regulator in an EPA regional office overseeing Class VI wells (*i.e.*, the Class VI Director) has the authority to determine whether a Class II well at which EOR operations are occurring must "transition" to a Class VI well. This flies in the face of prevailing industry practice, as well as common sense. It also violates current law and the proper division of authority between EPA and states under SDWA.

As part of its rulemaking in 2010 creating the Class VI well category, EPA articulated a series of factors by which a Class II well with EOR operations could be reclassified a Class VI well, presumably to perform CCS-type operations instead. 40 C.F.R. § 144.19. This included such criteria as an increase in reservoir pressure within the injection zone, an increase in CO_2 injection rates, suitability of the Class II area of review delineation, the owner's or operator's plan for recovery of CO_2 at the cessation of injection, the source and properties of injected CO_2, and any additional site specific factors as determined by the regulator. *Id.* Many Class II permit holders communicated to EPA that these criteria were too vague and could lead to the reclassification of wells in which CCS was neither intended nor actually occurring. In response, EPA prepared and issued the Draft Guidance in December 2013.

The Draft Guidance correctly states that while CO_2 is stored underground during EOR operations in a Class II well, this alone does not require the transition of the Class II well into a Class VI well. To the contrary, EPA has plainly stated that EOR operations at a Class II well are not to be affected by the Class VI rule:

> Traditional ER projects are not impacted by this rulemaking and will continue operating under Class II permitting requirements. EPA recognizes that there may be some CO_2 trapped in the subsurface at these operations; however, if there is no increased risk to [underground sources of drinking water (USDW)], then these operations would continue to be permitted under Class II.

75 Fed. Reg., at 77245. The Draft Guidance properly reiterates this point, stating "[t]raditional EOR projects are not affected by the Class VI rulemaking and will continue to be permitted under Class II requirements." Draft Guidance, at 1.

But then the Draft Guidance goes on to describe scenarios in which a Class II well with EOR operations would need to be reclassified as a Class VI well, based on the unchecked increase in subsurface pressures caused by the injection of CO_2. This is blatantly inconsistent with prevailing practices in the oil and gas industry and contrary to law.

Under the UIC Program, our states are vested with authority to permit Class II wells with EOR for purposes of enabling the production of oil. As part of this, the state-level Class II Director reviews maximum and average injection pressures and other information to ensure that CO_2 injection will "not result in the movement of fluids into a USDW so as to create a significant health risk." Draft Guidace, at A-4-A-5. Class II regulations specify limits on injection pressures to prevent the movement of injection or formation fluids into a USDW or the fracturing of the confining zone. *Id.* at A-8. *See also* 40 C.F.R. § 146.23(a). The Class II framework is thus wholly competent to prevent unchecked increases in subsurface pressures during EOR operations and other traditional oil and gas production methods. The scenario described by EPA as a trigger for reclassification simply is not reflective of real world operating conditions.

The actual circumstance under which reclassification would occur, also described in the Draft Guidance, is where a Class II operator changes the primary purpose of the well from the production of oil to the maximal underground storage of CO_2 and, in so doing, changes its operations in such a way as to transcend the confines of the Class II regulatory structure and create an "increased risk to USDWs compared to traditional Class II operations using carbon dioxide." Draft Guidance, at ii. Importantly, this is not so easily done. A Class II permit holder cannot change from EOR to maximal CO_2 storage without accounting for numerous other interests and legal and business considerations. For example, its contractual obligations with land owners and/or subsurface rights holders would most likely need to be altered, if not renegotiated, to accommodate such a transition. Similarly, state laws intended to enable oil and gas production can, in certain circumstances, interfere or even prohibit the use of oil and gas wells for maximal CO_2 storage if future production would be inhibited.

But regardless, the Draft Guidance further complicates and confuses the situation by erroneously implying that the Class VI Director can, on his or her own volition, preempt the Class II Director and require the Class II permit holder to file for reclassification under ClassVI. This is not lawful. Allowing the Class VI Director to "second guess" the Class II Director and intervene seemingly on a whim violates EPA's own rules regarding state primacy and flagrantly impinges upon state authority. EPA cannot revoke a state's primacy unless it can show a failure to comply with applicable requirements. 40 C.F.R. § 145.34(b). These requirements prescribe a series of detailed steps EPA must follow in order to do so, including providing adequate notice to the state and allowing the state sufficient time to take corrective action.

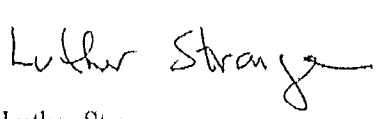
Thus the Draft Guidance, in overtly implying that the Class VI Director is empowered to act unilaterally within an industry in which he or she lacks requisite experience – thereby exposing a Class II permit holder to the seemingly unbounded risk of being ordered, absent any

specific criteria, to apply for reclassification – is utterly and entirely beyond the bounds of EPA authority and carries the very real possibility of doing harm to our nation's energy infrastructure. Moving beyond the confines of a traditional Class II well with EOR operations to maximal CO_2 storage is not easily nor quickly done and implicates significant economic and other business considerations. Allowing the Class VI Regulator to intervene seemingly without basis adds an unconscionable level of uncertainty and risk to a mature area of industrial activity already well and thoroughly regulated.

For the foregoing reasons, we respectfully request you take immediate action to rectify this situation as the Draft Guidance is finalized and, additionally, through any other rulemakings as may be necessary under the UIC Program to eliminate this uncertainty and ensure strict adherence to applicable law.

Sincerely,

E. Scott Pruitt
Oklahoma Attorney General

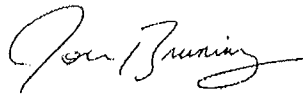


Luther Strange
Alabama Attorney General

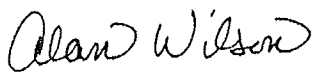
Greg Abbott
Texas Attorney General

Bill Schuette
Michigan Attorney General

Peter Michael
Wyoming Attorney General



Jon Bruning
Nebraska Attorney General



Alan Wilson
South Carolina Attorney General

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 27

OFFICE OF
WATER

P. Clayton Eubanks
Deputy Solicitor General
Office of the Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105

Dear Deputy Solicitor General Eubanks:

Thank you for your February 28, 2014, letter to Administrator Gina McCarthy, which references the comments sent by the Attorney General of Oklahoma, Alabama, Nebraska, South Carolina, Michigan, Texas, and Wyoming regarding the EPA's draft Underground Injection Control (UIC) program guidance document pertaining to Geologic Sequestration (GS) in general, and the transitioning of Class II wells to Class VI wells, specifically. As the Director of the Office of Ground Water and Drinking Water, which oversees the Underground Injection Control Program, I have been asked to reply to this letter.

The Agency released the draft version of the Class II to Class VI transition guidance for a 75-day public comment period, to provide an opportunity for our stakeholders to submit comments regarding the draft guidance. We appreciate and will carefully consider the comments provided by the Attorney General addressing the authorities of the State Class II UIC Directors in managing their Class II programs and enhanced oil recovery (EOR) projects using carbon dioxide. The Agency is currently compiling and reviewing all of the comments received. The Agency will make the appropriate revisions to address issues raised by commenters before publishing a final document.

Please feel free to contact me if you have any questions on this important issue, or your staff may call Ronald Bergman, Division Director of the Drinking Water Protection Division at (202) 564-3823.

Sincerely,

Peter C. Grevatt, Director
Office of Ground Water and Drinking Water

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
E. SCOTT PRUITT
ATTORNEY GENERAL

OFFICE OF ATTORNEY GENERAL
STATE OF WEST VIRGINIA
PATRICK MORRISEY
ATTORNEY GENERAL

OFFICE OF ATTORNEY GENERAL
STATE OF NEBRASKA
JON BRUNING
ATTORNEY GENERAL

August 25, 2014

Via Certified Mail and Regulations.gov
The Honorable Gina McCarthy
Administrator
U.S. Environment Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

2014 SEP -2 AM 7:03

Re: Request for Withdrawal (EPA-HQ-OAR-2013-0602 and EPA-HQ-OAR-2013-0603)

Dear Administrator McCarthy:

This letter concerns the failure of the Environmental Protection Agency ("EPA") to include required and critical information in the regulatory dockets of two recent proposed rules: the *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units* ("Existing Source Rule")[1] and the *Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units* ("Modified Sources Rule")[2] (together, "Proposed Rules"). By failing to include in the dockets key materials on which the agency relies as support for the Proposed Rules, EPA has violated Section 307(d) of the Clean Air Act ("CAA") (codified at 42 U.S.C. § 7607(d)). Both the Existing Source Rule and the Modified Sources Rule must thus be withdrawn.

Section 307(d) of the CAA imposes certain mandatory requirements for all proposed rules, which reflect Congress's judgment that information on which a proposed rule is based must be made available to the public at the time of proposal to ensure meaningful comment and sound rulemaking. Upon publication, a proposal must include a "statement of basis and purpose . . . [which] shall include a summary of . . . the factual data on which the proposed rule is based[,] . . . the methodology used in obtaining the data and in analyzing the data[,] and . . . the major legal interpretations and policy considerations underlying the proposed rule." 42 U.S.C. § 7607(d). Section 307(d) further requires that "*[a]ll data, information, and documents* . . . on

[1] 79 Fed. Reg. 34,830 (June 18, 2014).
[2] 79 Fed. Reg. 34,960 (June 18, 2014).

which the proposed rule relies shall be included in the docket *on the date of publication* of the proposed rule." *Id.* (emphases added). These docketing requirements are nondiscretionary. *See Union Oil Co. v. EPA*, 821 F.2d 678, 681-82 (D.C. Cir. 1987). Finalizing a rule without providing parties with the technical information necessary for meaningful comment renders the final rule unlawful. *See Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982). Nor can the problem be cured by late docketing of the required data, as such late docketing does not permit the public with sufficient time for meaningful review and comment. *See Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 540 (D.C. Cir. 1983); *Sierra Club v. Costle*, 657 F.2d 298, 398 (D.C. Cir. 1981).

In the Existing Source Rule and the Modified Sources Rule, EPA has repeatedly violated Section 307's unambiguous requirements:

In the Existing Source Rule, EPA omitted from the docket 84% of the modeling runs on which it relied in crafting the proposed Rule, without which the States and the public cannot comment meaningfully on the proposal. Specifically, the docket does not include 21 out of 25 of the Integrated Planning Model modeling runs that the agency used to justify the standards imposed by the Rule. The missing modeling runs cover projections for 2016, 2018, 2020, 2025 and 2030. This information is critical to assessing EPA's claims that States and industry will be able to comply with the four "building blocks" in the proposed Existing Source Rule. The States need the modeling run data for sufficient analysis of what that data shows on a unit by unit and state by state basis.

Similarly, EPA failed to include in the Existing Source Rule's docket vital net heat rate and emissions data, which are central to EPA's assertion that existing power plants are able to achieve a four to six percent heat rate improvement under EPA's first "building block." For example, EPA claims in the proposed Existing Source Rule to have reviewed its database of existing coal-fired units and found 16 facilities that have achieved heat rate improvements of three to eight percent "year-to-year,"[3] but it does not include any supporting data. Without the "year-to-year" data showing that facilities can comply with the four to six percent heat rate improvement, the States and the public cannot meaningfully comment on the achievability of EPA's heat rate projections.

In the Modified Sources Rule, EPA has completely failed to include *any technical information to support its proposed standard* for modified Subpart Da units or for the proposed standards for either modified or reconstructed Subpart KKKK units. For instance, the preamble to the Modified Source Rule references a technical support document, "Standard of Performance of Natural Gas-Fired Combustion Turbines," which it says is available in the docket. *See* 79 Fed. Reg. at 34,990 n.94. But that document is not available on the docket. Without such missing data and related materials, States and the public cannot properly determine the basis on which EPA claims that these emission standards are achievable and reasonable.

---

[3] EPA, GHG Abatement Measures, Technical Support Document ("TSD") for *Carbon Pollution Guidelines for Existing Power Plants: Emission Guidelines for Greenhouse Gas Emissions from Existing Stationary Sources: Electric Generating Units*, at 2-32 (EPA-HQ-2013-0602) (June 10, 2014).

All told, the missing information unquestionably constitutes "data, information and documents," and likely contains "policy considerations underlying the proposed rule" that should have been in the rulemaking dockets from the beginning, according to Section 307(d). Deprived of this missing information, the notices of proposed rulemaking published on June 18 "fail[ed] to provide an accurate picture of the reasoning that has led [EPA] to the proposed rule." *Conn. Light*, 673 F.2d at 530. This is particularly problematic where, as here, the proposals seek to overhaul the existing electric generating sector on an unprecedented scale. *See Maryland v. E.P.A.*, 530 F.2d 215, 222 (4th Cir. 1975) (vacating rule due to EPA's failure to comply with notice and comment requirements, emphasizing the "drastic impact" that compliance with rule would have), *vacated on other grounds*, 431 U.S. 99 (1977).

In light of these clear violations of Section 307, EPA should withdraw the Existing Source Rule and the Modified Sources Rule immediately. With regard to the proposed Existing Source Rule, that Rule is wholly unlawful on other grounds and therefore may not be re-proposed at all, even if EPA were to compile the data and documents required by Section 307. *See* Letter from Patrick Morrisey, Attorney General of West Virginia, to Gina McCarthy, Administrator, EPA (June 6, 2014); *State of West Virginia, et al. v. EPA*, No. 14-1146 (D.C. Cir.); *In re Murray Energy Corporation*, No. 14-1112 (D.C. Cir.). As to the proposed Modified Sources Rule, the comment deadline on that rule is October 16, 2014 and is thus fast approaching. The undersigned States therefore request that if EPA wishes to press forward with the Modified Sources Rule, EPA should withdraw that Rule and re-propose it with all the supporting documents and data required by Section 307. EPA should then provide 120 days from the re-proposal date to provide sufficient time for States and the public to review and comment. Alternatively, EPA should—at a minimum—publish the missing data immediately and then extend the comment period 120 days from the date of such publication.

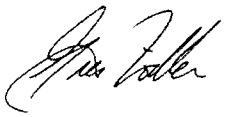
Sincerely,

Patrick Morrisey
West Virginia Attorney General

Jon Bruning
Nebraska Attorney General

E. Scott Pruitt
Oklahoma Attorney General

Luther Strange
Alabama Attorney General



Gregory F. Zoeller
Indiana Attorney General

Alan Wilson
South Carolina Attorney General

Derek Schmidt
Kansas Attorney General

Marty J. Jackley
South Dakota Attorney General

James D. "Buddy" Caldwell
Louisiana Attorney General

Peter K. Michael
Wyoming Attorney General

Tim Fox
Montana Attorney General

Wayne Stenehjem
North Dakota Attorney General

Mike DeWine
Ohio Attorney General

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
STATE CAPITOL BUILDING, E-26
CHARLESTON, WV 25305

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RECEIVED AUG 2 7 2014

Hope, Brian

From: Hamilton, Sabrina
Sent: Wednesday, May 27, 2015 6:06 PM
To: Mallory, Brenda; Veney, Carla
Cc: Walker, Jean; Terry, Sara; Lubetsky, Jonathan; Niebling, William; Noonan, Jenny; Salvador, Brenda
Subject: FW: 2014 Overdues -- AX-14-001-4369
Attachments: 14-001-4369.pdf; 15-000-7178.pdf

Brenda and Carla,

This a heads up the let you know that I'm requesting reassignment of AX-14-001-4369 to be assigned to OGC for action. When OGC responds to the Attorney General letter of March 25, 2015 (AX-15-000-7178), please also reference the Aug. 25, 2014 (AX-14-001-4369) letter from the Attorney Generals. Once the response is signed, OGC can close both control numbers using the same response letter.

I'm going to import this email into the Support Documents of control number AX-14-001-4369 for the record. Thanks

Sabrina

Sabrina Hamilton
Air and Radiation Liaison Specialist
and FOIA Coordinator
Office of Air and Radiation - Correspondence Unit
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue, N.W. (6101-A)
Washington, D.C. 20460
Tel: (202) 564-1083
Fax: (202) 501-0600

From: Lubetsky, Jonathan
Sent: Wednesday, May 27, 2015 2:15 PM
To: Terry, Sara; Hamilton, Sabrina; Walker, Jean
Cc: Noonan, Jenny; Niebling, William
Subject: RE: 2014 Overdues

In April, OGC was assigned a related letter, 7178, from the same AG's. OGC is in responding to that letter, and I would suggest we ask that this letter be closed out, and that OGC include it in the response to the March letter. Both letters are attached. William, do you want to reach out to Lorie/ OGC if you agree?

From: Terry, Sara
Sent: Wednesday, May 27, 2015 1:54 PM
To: Hamilton, Sabrina; Walker, Jean
Cc: Noonan, Jenny; Niebling, William; Lubetsky, Jonathan
Subject: RE: 2014 Overdues

We need the triage team to look at 4369 and advise.

Sara

From: Hamilton, Sabrina
Sent: Wednesday, May 27, 2015 1:14 PM
To: Walker, Jean
Cc: Noonan, Jenny; Terry, Sara
Subject: FW: 2014 Overdues

Jean,

Can you please give me a status on the controls below. We need to close them out ASAP. Please advise. Thanks

Sabrina

Sabrina Hamilton
Air and Radiation Liaison Specialist
and FOIA Coordinator
Office of Air and Radiation - Correspondence Unit
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue, N.W. (6101-A)
Washington, D.C. 20460
Tel: (202) 564-1083
Fax: (202) 501-0600

From: Matthews, Barbara
Sent: Wednesday, May 27, 2015 12:34 PM
To: Hamilton, Sabrina
Subject: RE: 2014 Overdues

AX-14-000-7041 from what I can see in CMS (Trish Botkin) was reassigned to R8 OPRA as lead
AX-14-001-4369 per Jenny Noonan 11/3/14 control was returned to PACS

From: Hamilton, Sabrina
Sent: Wednesday, May 27, 2015 8:54 AM
To: Matthews, Barbara
Subject: FW: 2014 Overdues

Barbara,

I can't access CMS. Can you check to see where these two controls are and let me know? Thanks

Sabrina

Sabrina Hamilton
Air and Radiation Liaison Specialist
and FOIA Coordinator
Office of Air and Radiation - Correspondence Unit
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue, N.W. (6101-A)
Washington, D.C. 20460
Tel: (202) 564-1083
Fax: (202) 501-0600

From: Salvador, Brenda
Sent: Tuesday, May 26, 2015 9:28 AM

To: Hamilton, Sabrina
Subject: 2014 Overdues

Sabrina

Please check on these either have program send response or give justification why these should be closed out.

AX-14-000-7041 Malek OAR
AX-14-001-4369 Zoeller OAR

Thanks
Brenda

Wed Oct 08 21:14:00 EDT 2014
Gaines.Cynthia@epamail.epa.gov
FW: 111(b) extension request
To: CMS.OEX@epamail.epa.gov

From: Hamilton, Sabrina
Sent: Tuesday, October 07, 2014 3:23 PM
To: Gaines, Cynthia
Cc: Faulkner, Martha; Matthews, Barbara; Knapp, Kristien; Leavy, Jacqueline; Salvador, Brenda
Subject: FW: 111(b) extension request
Importance: High

Cynthia,

Per my voice mail, can you please have Jackie or Brenda assign the attached letter to OAR for action. We are in the process of preparing a response and Janet wants it to go out this week. Thanks

Sabrina

Sabrina Hamilton
Air and Radiation Liaison Specialist

and FOIA Coordinator
Office of Air and Radiation - Correspondence Unit
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue, N.W. (6101-A)
Washington, D.C. 20460
Tel: (202) 564-1083
Fax: (202) 501-0600

From: Knapp, Kristien
Sent: Tuesday, October 07, 2014 3:14 PM
To: Hamilton, Sabrina
Cc: Stewart, Lori
Subject: FW: 111(b) extension request
Importance: High

Sabrina – Can you check to see if this is in CMS yet, and if not, can you put it in CMS and prepare the folder so that we can quickly route it for signature?

Kevin Culligan is coordinating the draft response and will send it to us once it's ready. Janet would like to send a response ASAP.

From: Knapp, Kristien
Sent: Tuesday, October 07, 2014 3:11 PM
To: Culligan, Kevin
Subject:

Ms. McCabe-

Attached is a CORRECTED version of the request for an extension of the comment period deadline for the proposed modified source rule for carbon dioxide emissions from power plants, which was filed today on regulations.gov by Ohio Attorney General Mike DeWine

on behalf of Ohio and 13 other states. This version corrects a typographical error in the date to accurately reflect that the letter was originally submitted on Friday, October 3, 2014.

Thank you,

Cameron F. Simmons
Assistant Attorney General – Environmental Enforcement Section
Office of Ohio Attorney General Mike DeWine
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
Office number: 614-466-2766
Fax number: 614-644-1926
Cameron.Simmons@OhioAttorneyGeneral.gov

From: Cameron F. Simmons
Sent: Friday, October 03, 2014 6:48 PM
To: 'McCabe.janet@epa.gov'
Cc: Dale T. Vitale; Gregg H. Bachmann; Aaron Farmer
Subject: Extension request - comment period for Modified and Reconstructed Source Rule EGUs

Ms. McCabe-

Attached is a request to extend the deadline for the comment period on the Modified and Reconstructed Source Rule for carbon dioxide emissions. Please note this request is being made by Ohio and 13 other states. This was formally filed in the Docket on regulations.gov.

Respectfully,

Cameron F. Simmons
Assistant Attorney General – Environmental Enforcement Section
Office of Ohio Attorney General Mike DeWine
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
Office number: 614-466-2766
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MIKE DEWINE
OHIO ATTORNEY GENERAL

Environmental Enforcement
Office 614-466-2766
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30 E. Broad St., 25th Floor
Columbus, OH 43215
www.OhioAttorneyGeneral.gov

October 3, 2014

Via regular U.S. Mail and Electronic Mail
Filed in Docket EPA-HQ-OAR-2013-0603

Regina A. McCarthy
Administrator
United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460

RE: Proposed Rule - Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units
EPA-HQ-OAR-2013-0603

Dear Administrator McCarthy:

The States of Ohio, Alabama, Alaska, Indiana, Kansas, Louisiana, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, West Virginia, and the Commonwealth of Kentucky respectfully request that the United States Environmental Protection Agency extend the deadline for submitting comments on the proposed rule to regulate carbon dioxide emissions from modified and reconstructed power plants.

On June 18, 2014, EPA proposed two independent, but interrelated, rules to regulate carbon dioxide emissions from power plants. See *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 FR 34829 (proposed June 18, 2014 ("Existing Source Proposed Rule") and *Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units*, 79 FR 34959 (proposed June 18, 2014) ("Modified and Reconstructed Source Proposed Rule"). In both proposed rules, EPA announced October 16, 2014 as the deadline for submitting comments.

Recently, EPA extended the deadline for submitting comments on the Existing Source Proposed Rule until December 1, 2014. *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 FR 57492 (Sept. 25, 2014). However, EPA did not extend the deadline for submitting comments on the Modified and Reconstructed Source Proposed Rule.

Due to the interconnected nature of the two proposed rules and the anticipated overlap in the comments submitted in response to the proposed rules, the States of Ohio, Alabama, Alaska, Indiana, Kansas, Louisiana, Montana, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, West Virginia, and the Commonwealth of Kentucky respectfully request that EPA

extend the deadline for submitting comments on the Modified and Reconstructed Proposed Rule to December 1, 2014.

Very respectfully,

MIKE DEWINE
OHIO ATTORNEY GENERAL
30 East Broad Street
Columbus, OH 43215

Luther Strange
Alabama Attorney General
Office of the Alabama Attorney General
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South Carolina Attorney General
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Columbia, SC 29211

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West Virginia Attorney General
State Capitol
1900 Kanawha Blvd. East
Charleston, WV 25305

For the Commonwealth of Kentucky:

Jack Conway
Attorney General of Kentucky
700 Capital Avenue, Suite 118
Frankfort, Kentucky, 40601

cc: Janet McCabe, Acting Assistant Administrator, Office of Air and Radiation

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT - 9 2014

OFFICE OF
AIR AND RADIATION

The Honorable Mike DeWine
Ohio Attorney General
30 East Broad Street
Columbus, Ohio 43215

Dear Mr. DeWine:

I am writing regarding your letter to Administrator McCarthy dated October 3, 2014, which I received electronically. In the letter, you request a 45-day extension of the public comment period for the proposed "Carbon Pollution Standards for Modified and Reconstructed Stationary Sources: Electric Utility Generating Units," which was published in the *Federal Register* on June 18, 2014. The Administrator asked that I respond on her behalf.

The proposal identified an unusually lengthy public comment period of 120 days from the date of publication of the proposal in the *Federal Register*. The proposal was published on June 18, 2014, therefore the comment period ends on October 16, 2014. Because the proposal was made available on the U.S. Environmental Protection Agency website immediately upon signature on June 2 (http://www2.epa.gov/carbon-pollution-standards/regulatory-actions), the comment period will effectively be 136 days. This comment period is significantly longer than statutorily required and we believe affords the public with sufficient time to provide input to the agency. Therefore, the EPA respectfully denies your request for an extension of the public comment period.

We appreciate your interest in this important rule and look forward to receiving and considering your input. Again, thank you for your letter. I appreciate the opportunity to be of service and hope this response has been helpful.

Sincerely,

Janet G. McCabe
Acting Assistant Administrator

Hope, Brian

From: Atkinson, Emily
Sent: Thursday, October 09, 2014 4:13 PM
To: McCabe, Janet; Stewart, Lori
Cc: Hamilton, Sabrina
Subject: FW: Extension request - comment period for Modified and Reconstructed Source Rule EGUs
Attachments: Signed Response to Mike DeWine -- AX-15-000-0427.pdf

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From: Atkinson, Emily
Sent: Thursday, October 09, 2014 4:12 PM
To: Cameron F. Simmons
Subject: RE: Extension request - comment period for Modified and Reconstructed Source Rule EGUs

This is a follow up to my previous email. Attached is Acting Assistant Administrator McCabe's response to Ohio Attorney General Mike DeWine's letter.

Thank you.
Emily

Emily Atkinson
Staff Assistant
Immediate Office of the Acting Assistant Administrator
Office of Air and Radiation, USEPA
Room 5406B, 1200 Pennsylvania Avenue NW
Washington, DC 20460
Voice: 202-564-1850
Email: atkinson.emily@epa.gov

From: Cameron F. Simmons [mailto:Cameron.Simmons@ohioattorneygeneral.gov]
Sent: Monday, October 06, 2014 5:06 PM
To: Atkinson, Emily
Subject: RE: Extension request - comment period for Modified and Reconstructed Source Rule EGUs

Emily-

Thank you for the confirmation email and update. We appreciate it.

Cameron F. Simmons
Assistant Attorney General – Environmental Enforcement Section
Office of Ohio Attorney General Mike DeWine
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
Office number: 614-466-2766
Fax number: 614-644-1926
Cameron.Simmons@OhioAttorneyGeneral.gov

From: Atkinson, Emily [mailto:Atkinson.Emily@epa.gov]
Sent: Monday, October 06, 2014 2:04 PM
To: Cameron F. Simmons
Subject: RE: Extension request - comment period for Modified and Reconstructed Source Rule EGUs

Hi Cameron,

On behalf of Ms. McCabe, I am confirming that your request for an extension on the comment period for the Modified and Reconstructed Source proposal has been received, and is under consideration. A written response will follow soon.

Thank you.

Emily Atkinson
Staff Assistant
Immediate Office of the Acting Assistant Administrator
Office of Air and Radiation, USEPA
Room 5406B, 1200 Pennsylvania Avenue NW
Washington, DC 20460
Voice: 202-564-1850
Email: atkinson.emily@epa.gov

From: Cameron F. Simmons [mailto:Cameron.Simmons@ohioattorneygeneral.gov]
Sent: Monday, October 06, 2014 1:24 PM
To: McCabe, Janet
Cc: Dale T. Vitale; Gregg H. Bachmann; Aaron Farmer
Subject: FW: Extension request - comment period for Modified and Reconstructed Source Rule EGUs

Ms. McCabe-

Attached is a CORRECTED version of the request for an extension of the comment period deadline for the proposed modified source rule for carbon dioxide emissions from power plants, which was filed today on regulations.gov by Ohio Attorney General Mike DeWine on behalf of Ohio and 13 other states. This version corrects a typographical error in the date to accurately reflect that the letter was originally submitted on Friday, October 3, 2014.

Thank you,

Cameron F. Simmons
Assistant Attorney General – Environmental Enforcement Section
Office of Ohio Attorney General Mike DeWine
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
Office number: 614-466-2766
Fax number: 614-644-1926
Cameron.Simmons@OhioAttorneyGeneral.gov

From: Cameron F. Simmons
Sent: Friday, October 03, 2014 6:48 PM
To: 'McCabe.janet@epa.gov'
Cc: Dale T. Vitale; Gregg H. Bachmann; Aaron Farmer
Subject: Extension request - comment period for Modified and Reconstructed Source Rule EGUs

Ms. McCabe-

Attached is a request to extend the deadline for the comment period on the Modified and Reconstructed Source Rule for carbon dioxide emissions. Please note this request is being made by Ohio and 13 other states. This was formally filed in the Docket on regulations.gov.

Respectfully,

Cameron F. Simmons
Assistant Attorney General – Environmental Enforcement Section
Office of Ohio Attorney General Mike DeWine
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OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

E. SCOTT PRUITT
ATTORNEY GENERAL

OFFICE OF ATTORNEY GENERAL
STATE OF WEST VIRGINIA

PATRICK MORRISEY
ATTORNEY GENERAL

OFFICE OF ATTORNEY GENERAL
STATE OF NEBRASKA

JON BRUNING
ATTORNEY GENERAL

Comment from the Attorneys General of the States of Oklahoma, West Virginia, Nebraska, Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Montana, North Dakota, Ohio, South Carolina, South Dakota, Utah and Wyoming on Proposed EPA Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units[1]

Docket ID No. EPA–HQ–OAR–2013–0602
submitted at regulations.gov
and via email to: *A-and-R-Docket@epa.gov*

On June 18, 2014, EPA proposed emission guidelines for carbon dioxide emissions from existing fossil fuel-fired power plants, invoking its authority under Section 111(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7411(d). *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34,830 (June 18, 2014) (hereinafter "Proposal"). EPA's proposal attempts to use the Clean Air Act to override states' energy policies and impose a national energy and resource-planning policy that picks winners and losers based solely on EPA's policy choices, forcing states to favor renewable energy sources and demand-reduction measures over fossil fuel-fired electric production. But the Clean Air Act generally and Section 111(d) specifically do not give EPA that breathtakingly broad authority to reorganize states' economies. "Congress . . . does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). Congress did not hide the authority to impose a national energy policy in the "mousehole" of this obscure, little-used provision of the Clean Air Act, which EPA has only invoked five times in 40 years.

The proposed rule has numerous legal defects, each of which provides an independent basis to invalidate the rule in its entirety.

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[1] : The States of Georgia, Indiana, Montana, North Dakota, Ohio and Utah, among others, also intend to file additional separate comments that address the proposed rule.

First, the proposed rule is unlawful because EPA has chosen to regulate coal-fired power plants under Section 112 of the Clean Air Act, 42 U.S.C. § 7412. Section 111(d) specifically prohibits EPA from invoking Section 111(d) where the "source category . . . is regulated under section [112]. . . ." 42 U.S.C. § 7411(d)(1)(A)(i). EPA should abandon its cynical attempt to evade this specific prohibition on its authority found in the Clean Air Act's plain text.

Second, the proposed rule is unlawful because EPA has not finalized Section 111(b) "new source" regulation of carbon dioxide emission from coal-fired power plants, which is legally necessary before any Section 111(d) regulation of those plants. And given that the *proposed* Section 111(b) new source standards are patently unlawful, no such predicate is likely forthcoming.

Third, the proposed rule impermissibly expands EPA's authority into the management of states' energy generation and usage. Rather than limiting itself to EPA's narrow mandate of air pollution control, the proposed rule forces states to abandon their sovereign rights in favor of a national energy consumption policy.

Fourth, the proposed rule includes inflexible mandates that each state *must* achieve, rather than the guidelines and appropriate procedures for states to use in establishing standards of performance for sources under their jurisdiction that are actually authorized by Section 111(d). This attempt to federalize areas of energy policy improperly proposes to negate states' authority to determine that EPA's guidelines are inconsistent with factors such as consideration of costs, physical impossibility, energy needs, and the "remaining useful life of the existing source."

Fifth, in applying these standards of performance, states are limited to emission standards that can actually be achieved by existing industrial sources through source-level, inside-the-fenceline measures. The proposal's attempt to force states to regulate energy consumption and generation throughout their jurisdictions, in the guise of reducing emissions from fossil fuel-fired power plants, violates Section 111(d)'s plain-text requirement that the performance standards established for existing sources by the states must be limited to measures that apply at existing power plants themselves.

Sixth and finally, even assuming *arguendo* that EPA has authority to impact energy policy decisions under Section 111(d), the proposed rule's attempt to federalize control over state energy policy is inconsistent with the Federal Power Act. It is unreasonable for EPA to propose regulation under Section 111(d) that would allow precisely the type of federal control over state decision-making that Congress denied to the federal government in the context of the Federal Power Act.

* * *

Given the multitude of legal deficiencies in its proposal, some of which go to the heart of its authority to regulate fossil-fuel-fired power plants under Clean Air Act Section 111(d), EPA should honor the Act's core statutory limitations on its authority and formally determine that Section 111(d) standards are not appropriate for fossil fuel-fired power plants. If EPA does finalize Section 111(d) standards for fossil-fuel-fired power plants, it should not perpetuate the unlawful act by attempting to reorganize states' energy economies, but should instead promulgate emission guidelines based on the best system of emission reduction that is actually

achievable at individual facilities, which states could then consider in establishing performance standards to individual power plants in their jurisdictions.

I. The Clean Air Act Unambiguously Prohibits EPA from Regulating Power Plants Under Section 111(d) Now That EPA Has Chosen To Regulate Those Plants Under Section 112

The Clean Air Act prohibits EPA from regulating any emissions from a "source category" under Section 111(d) where the "source category . . . is regulated under section [112] . . . ." 42 U.S.C. § 7411(d)(1)(A)(i).[2] This prohibition is so clear that even EPA admits that the "literal" meaning of this language is that it "c[an] not regulate *any* air pollutant from a source category regulated under section 112." EPA, *Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units* at 26 (hereinafter "Legal Memorandum" or "Mem.") (emphasis added). Or, as the Supreme Court has explained, "EPA may not employ [Section 111(d)] if existing stationary sources of the pollutant in question are regulated under . . . the 'hazardous air pollutants' program, [Section 112]." *Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2537 n.7 (2011). This unambiguous statutory prohibition is grounded in Congress's understanding that existing sources—unlike new sources—should not be subject to double regulation, under two different regulatory regimes, in light of special concerns such as reliance and sunk costs.

In 2000, EPA took the discretionary step of classifying power plants as part of a "source category" under Section 112. 65 Fed. Reg. 79,825, 79,830 (Dec. 20, 2000). Then, in 2012, EPA imposed one of the most expensive regulations in the agency's history on these power plants under Section 112. 77 Fed. Reg. 9,304 (Feb. 16, 2012). This regulation, which is commonly known as the Mercury and Air Toxics Standard or the Utility MACT Rule, imposed $9.6 billion in annual costs on the electric generating industry and nearly $11 billion in total annual social costs, and will cause the retirement of more than 34 gigawatts of fossil fuel-fired electric generating capacity. *See id.* at 9,413, 9,425; Institute for Energy Research, *Impact of EPA's Regulatory Assault on Power Plants* (June 12, 2012). Given that existing coal-fired power plants are now extensively regulated under Section 112, what EPA has admitted are the "literal" terms of the Clean Air Act prohibit EPA's present effort to impose yet more onerous regulations on these same plants under Section 111(d). Mem. at 26.

Indeed, one recent study projects that the Proposal will result in from 46 to *169* additional gigawatts retired unless EPA makes significant corrections. *See* NERA Economic Consulting, on behalf of American Coalition for Clean Coal Electricity et al., *Potential Energy Impacts of the EPA Proposed Clean Power Plan* (October 2014). Specifically, the study projects coal-unit retirements of between 97 and 220 gigawatts, as compared to 51 gigawatts under a baseline

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[2] Several of the commenting states have filed suit to invalidate EPA's proposal on these grounds.

scenario. *Id.* at 15, Fig. 4. Retirements on this scale are likely to seriously threaten the reliability of our nation's electric supply. State regulators and industry stakeholders have warned that the proposal will force them to choose between meeting its requirements at the risk of potentially violating FERC reliability mandates, or complying with those mandates at the risk of failure to comply with the proposal. Southwest Power Pool predicts the proposal will increase retirements in its area by 200%, risking "rolling blackouts or cascading outages" with significant economic, health, and safety impacts.[3] And the Electric Reliability Council of Texas warns that the proposal "will have a significant impact on the planning and operation of" its grid, forcing the retirement of between 3.3 and 8.7 gigawatts in its region alone—in short, the proposal threatens "a harmful impact on reliability."[4] North Dakota officials have expressed concern that FERC may reject on reliability grounds the states' 111(d) plans, and may even impose significant penalties for any blackouts and similar failures that might result from states' efforts to meet EPA's requirements.[5]

FERC Commissioner Moeller has warned that the proposed shift from least-cost to least-emission dispatch priorities "has the potential to completely undermine the market principles that underpin dispatch of the system."[6] And the North American Electric Reliability Corporation ("NERC"), the international body specifically tasked by Congress with monitoring reliability, has recently determined that "Essential Reliability Services may be strained by the proposed" rule, and that the rule's requirements "represent a significant reliability challenge."[7] Specifically, NERC observes that, among other factors, "[p]ipeline constraints and growing gas and electric interdependency challenges" and the need for "more transmission and new operating procedures" will limit states' and utilities' ability to comply with the proposal while preserving reliability.[8] And the retirements of coal-fired units due to the proposal will "lessen[] the industry's diversification of fuel sources."[9] Cumulatively, these issues mean the proposal will impair the reliability of the grid, especially under extreme weather conditions such as last winter's "polar vortex."[10]

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[3] Southwest Power Pool, Comments on 111(d) Proposal, at 6 (Oct. 9, 2014).

[4] ERCOT Analysis of the Impacts of the Clean Power Plan, at 1, 10 (Nov. 17, 2014). *See also id.* at 18 ("The proposed CO_2 emissions limitations will result in significant retirement of coal generation capacity, could result in transmission reliability issues due to the loss of fossil fuel-fired generation resources in and around major urban centers, and will strain ERCOT's ability to integrate new intermittent renewable generation resources.").

[5] InsideEPA, "States Face ESPS Dilemma Over Whether To Comply With EPA Or FERC," Oct. 8, 2014.

[6] Response of FERC Commissioner Moeller to Additional Questions For the Record from the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Energy and Power, at 5 (Aug. 26, 2014).

[7] NERC, Potential Reliability Impacts of EPA's Proposed Clean Power Plan, at 1, 2 (Nov. 2014).

[8] *Id.* at 2.

[9] *Id.* at 9; *see also id.* at 19 & Fig. 7 (discussing impact of proposal on retirements).

[10] *See id.*

These retirements are likely to impose significant costs on ordinary citizens throughout the country. The NERA study projects an increase in total consumer energy costs of between $366 billion and $479 billion over the period 2017-2031. *Potential Energy Impacts* at 21, Fig. 11. (The cost of natural gas for non-electricity energy services is specifically predicted to increase by between $15 billion and $144 billion.) This includes an increase of between 13 and 15 percent in electricity prices for residential customers. *Id.* at 25, Fig. 16. These increases will not be evenly distributed. Although prices are projected to rise in all states, the impact will be heaviest in the West, with Texas projected to suffer as much as a 54% increase in prices across all sectors. *Id.* at 25-26, Figs. 16 & 17.

EPA's only legal justification for departing from the Clean Air Act's "literal" text is based upon what EPA has admitted was "a drafting error," *see* 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005), which was properly excluded from the U.S. Code. Specifically, EPA claims that a single clerical entry in the 1990 Amendments to the Clean Air Act somehow renders the plain text of the Act ambiguous and thus permits EPA to regulate. Mem. at 25-27. This argument cannot withstand scrutiny. The clerical entry upon which EPA bases its entire rule was a non-substantive "conforming amendment," which was erroneously included in the 1990 Amendments to update a cross-reference to Section 112, tracking the rearrangement of that section elsewhere in the Amendments. But the 1990 Amendments also fundamentally altered Section 111(d) and, in doing so, made the "conforming amendment" impossible to execute. In this exact situation—which is common in modern, complex legislation—the uniform practice is to give full meaning and effect to the substantive change in the law, and to ignore the non-substantive "conforming amendment" as a scrivener's error.[11] That is exactly what occurred here, as the codifier of the U.S. Code excluded the conforming amendment because it "could not be executed." Revisor's Note, 42 U.S.C. § 7411. Unsurprisingly, EPA has not cited a single decision, from any area of law, giving any meaning to a clerical change that was rendered moot by a substantive amendment. *See* Mem. at 26-27. To the contrary, controlling caselaw provides

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[11] *See, e.g.*, Revisor's Note, 5 U.S.C. app. 3 § 12; Revisor's Note, 7 U.S.C. § 2018; Revisor's Note, 8 U.S.C. § 1324b; Revisor's Note, 10 U.S.C. § 869; Revisor's Note, 10 U.S.C. § 1074a; Revisor's Note, 10 U.S.C. § 1407; Revisor's Note, 10 U.S.C. § 2306a; Revisor's Note, 10 U.S.C. § 2533b; Revisor's Note, 11 U.S.C. § 101; Revisor's Note, 12 U.S.C. § 1787; Revisor's Note, 12 U.S.C. § 4520; Revisor's Note, 14 U.S.C. ch. 17 Front Matter; Revisor's Note, 15 U.S.C. § 1060; Revisor's Note, 15 U.S.C. § 2081; Revisor's Note, 16 U.S.C. § 230f; Revisor's Note, 18 U.S.C. § 1956; Revisor's Note, 18 U.S.C. § 2327; Revisor's Note, 20 U.S.C. § 1226c; Revisor's Note, 20 U.S.C. § 1232; Revisor's Note, 20 U.S.C. § 4014; Revisor's Note, 21 U.S.C. § 355; Revisor's Note, 22 U.S.C. § 2577; Revisor's Note, 22 U.S.C. § 3651; Revisor's Note, 22 U.S.C. § 3723; Revisor's Note, 23 U.S.C. § 104; Revisor's Note, 26 U.S.C. § 105; Revisor's Note, 26 U.S.C. § 219; Revisor's Note, 26 U.S.C. § 613A; Revisor's Note, 26 U.S.C. § 1201; Revisor's Note, 26 U.S.C. § 4973; Revisor's Note, 26 U.S.C. § 6427; Revisor's Note, 29 U.S.C. § 1053; Revisor's Note, 33 U.S.C. § 2736; Revisor's Note, 37 U.S.C. § 414; Revisor's Note, 38 U.S.C. § 3015; Revisor's Note, 39 U.S.C. § 410; Revisor's Note, 40 U.S.C. § 11501; Revisor's Note, 42 U.S.C. § 218; Revisor's Note, 42 U.S.C. § 300ff-28; Revisor's Note, 42 U.S.C. § 3025; Revisor's Note, 42 U.S.C. § 5776; Revisor's Note, 49 U.S.C. § 47115.

that where a mistake in renumbering a statute and correcting a cross-reference conflicts with a substantive change, the mistake should not be considered when construing the substantive provision. *See, e.g.*, *Am. Petroleum Inst. v. SEC*, 714 F.3d 1329, 1336-37 (D.C. Cir. 2013).

And even if one were to accept EPA's assertion that it must give meaning to an impossible-to-execute clerical amendment, Mem. at 26, the proposed rule would still be unlawful. If the conforming amendment is executed separately from the substantive amendment, two different prohibitions on EPA's Section 111(d) authority would arise. Under one prohibition—in text of the Clean Air Act as reflected in the United States Code—EPA would be prohibited from regulating under Section 111(d) any emissions from any source categories actually regulated under Section 112. Under the "other" prohibition—the one embodied by the conforming amendment—Section 111(d) could not be used to regulate pollutants subject to regulation under Section 112, even if EPA has chosen not to regulate the particular source category at issue. (Given that EPA is not required to regulate all sources of Section 112-regulated hazardous air pollutants under Section 112, 42 U.S.C. § 7412(k)(3)(B)(ii), this category would almost certainly leave some sources of hazardous air pollutants unregulated. Indeed, a special provision of Section 112 permits EPA significant leeway not to regulate power plants at all under Section 112. *Id.* § 7412(n)(1)) Thus, if EPA "give[s] effect, if possible, to every word Congress used," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), it would be prohibited from invoking Section 111(d) *both* to regulate any source categories actually regulated under Section 112 *and* to regulate any pollutants subject to regulation under Section 112. Accordingly, even if EPA's approach of executing the conforming amendment into a separate "version" of Section 111(d) were permissible—which, to be clear, it is not—this would not salvage the proposed rule.

II. The Proposed Section 111(d) Rule Is Illegal Because EPA Has Not Finalized any Lawful Rule for Equivalent New Sources

Section 111(d) authorizes EPA to prescribe regulations under which States shall establish standards of performance for "any existing source for any pollutant . . . *to which a standard of performance under this section would apply if such source were a new source*." 42 U.S.C. § 7411(d)(1)(A)(ii) (emphasis added). As EPA has acknowledged since 1975, this provision prohibits EPA from invoking Section 111(d) unless and until it has completed and finalized a lawful rule for "new sources of the same type." 40 Fed. Reg. 53, 340, 53,340 (Nov. 17, 1975); *see also* 39 Fed. Reg. 36,102, 36,102 (Oct. 7, 1974) (proposed rule) (predicates for use of 111(d) include "[a] standard of performance for affected facilities *has been* promulgated under section 111(b) of the Act") (emphasis added). Put another way, promulgation of lawful new source performance standards is "a necessary predicate for the regulation of existing sources" under Section 111(d). 79 Fed. Reg. 1,430, 1,496 (Jan. 8, 2014). In the present rulemaking, EPA claims that it will satisfy that "necessary predicate" through two proposed rulemakings, once they are finalized: (1) the proposed new source performance standards for new fossil fuel-fired power plants ("New Source Rule"), 79 Fed. Reg. 1,430 (Jan. 8, 2014); and (2) performance standards for modified and reconstructed fossil fuel-fired power plants ("Modified Source Rule"). *See* Proposal, 79 Fed. Reg. 34,852 (June 18, 2014). EPA's arguments are flawed as a matter of law, and as a result the proposed Section 111(d) rule will be entirely unlawful.

First, the New Source Rule—if finalized in anything like its proposed form—will not be a *lawful* predicate for the proposed Section 111(d) rule. The New Source Rule is based upon EPA's claim that the "best system of emission reduction" for carbon dioxide emission from coal-fired power plants is partial carbon capture and storage ("CCS"). 79 Fed. Reg. at 1,430. But as 16 States explained in their comment letter to EPA, CCS is not the "best system of emission reduction" because CCS has not been shown to be reasonably reliable, efficient, broadly available, or economically feasible in *any* commercial setting. *See* Letter from Sixteen States to Gina McCarthy, Administrator, EPA at 2-8 (May 9, 2014) (docketed at EPA-HQ-OAR-2013-0495-9505) (hereinafter "States' Comment Letter"). In addition, as the States also explained, the proposed New Source Rule violates the Energy Policy Act of 2005 because EPA's claim that CCS technologies have been "adequately demonstrated" is based on government-funded projects that would not be economically viable without government funds; the 2005 Act expressly forbids EPA from relying on these projects when setting standards under Section 111. *See* States' Comment Letter at 8-9. Finally, the New Source Rule is arbitrary and capricious, as the States' Comment Letter articulated, because EPA's justifications for the rule are contrary to the agency's own predictions. Specifically, EPA's central rationale for promulgating the proposed New Source Rule—that the proposal will protect public health and address climate change—is entirely eliminated by EPA's own concession that the proposal "will result in negligible CO_2 emission changes, quantified benefits, and costs by 2022." 79 Fed. Reg. 1,430, 1,433. *See* States' Comment Letter at 10-11.

Second, EPA's fallback attempt to argue the Modified Source Rule could provide the "necessary predicate" for its Section 111(d) proposal when the New Source Rule is held unlawful is a transparent and illegal end-run around Section 111's text and structure. *See* 79 Fed. Reg. at 34,852. Unsurprisingly, EPA can point to no authority or prior examples to support such an approach, because it is plainly unlawful. Under Section 111(d)'s plain text, the predicate rulemaking must lawfully regulate equivalent "new" sources—not simply equivalent modified or reconstructed sources *only*. *See* 42 U.S.C. § 7411(d)(1)(A)(ii). The term "new source" is not ambiguous in this context. Instead, Section 111(a)(2) of the Act defines it as "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source." 42 U.S.C. § 7411(a)(2). This statutorily mandated sequence reflects Congress's understanding that, because regulation of existing sources raises special issues of reliance and sunk costs, regulation of those existing sources should only be implemented after regulation of all new sources (including but not limited to modified sources) has been lawfully finalized. Consistent with this plain text, EPA must first promulgate *lawful* standards of performance for new sources (*including* modified sources), and only thereafter may require the states to regulate equivalent existing sources.

As multiple submitted comments on the modified-source proposal demonstrate, the EPA's position that Section 111's ostensible silence as to whether a source that undergoes modifications ceases to be an existing source subject to 111(d) standards allows it to subject sources to *both* the 111(b) modified-source and 111(d) existing-source regimes is unlawful. But such arguments from silence are an "untenable" means of proving agency authority. *See infra* Section III; *see also Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174-75 (D.C. Cir. 2003). Both the structure of Section 111 and its subsections defining "new" and "existing"

sources make perfectly clear that these are mutually exclusive terms: an "existing" source that undergoes modifications becomes a "modified" source, *which is treated as a "new" source for Section 111's purposes*, and therefore falls under 111(b) alone. Because EPA may not lawfully issue a Section 111(b) modified source rule that covers only modified sources, let alone impose *both* that rule *and* a 111(d) rule on existing sources that undergo modifications, the modified-source rule will not and cannot provide a lawful predicate for the existing-source rule.

III. Section 111(d) Cannot Be Used To Override State Authority To Manage Power Resources

One of a state's core police powers is the power to promote the health and economic well-being of its citizens, including through the management of its energy and air quality resources. This sovereign power includes the authority to regulate—or not to regulate—the production and local distribution of electricity to its citizens. In states with significant coal resources, where mining operations are important employers and coal-fired energy can be generated inexpensively, states have authority to do so. Similarly, states that choose to exploit renewable energy resources, whether because those resources are affordable or because their citizens are willing to pay a premium for them, are free to follow that path. The Clean Air Act's role is limited to ensuring that, whatever path each state chooses, new and modified power plants meet state-of-the-art technology standards and pollution from all sources in a state does not interfere with national air quality goals.

In contrast, under the current Section 111(d) proposal, EPA's binding emission "goals" applicable to each state would require states to shift electric generation from coal- to gas-fired plants, to increase electric generation from sources other than fossil fuel-fired power plants, and to take measures that reduce electricity consumption or increase energy efficiency at the end-use, consumer level. In this way, the proposal combines a renewable energy portfolio with demand-side control measures to create a *de facto* national energy policy, at the expense of state authority and economic freedom. And there is no limiting principle to EPA's asserted reach under the proposal. Under EPA's reading of the Act, the agency could require states to mandate that consumers dim their lights on alternate days, limit home builders to constructing only two-story buildings, or shutter public schools during periods of peak energy usage. Because virtually all human activity in the modern age depends on electricity, regulation of any aspect of that activity could be viewed as affecting electricity production, which in turn affects power plants' carbon dioxide emissions. EPA's approach converts the obscure, little-used Section 111(d) into a general enabling act, giving EPA power over the entire grid from generation to light switch. This, in turn, would give EPA plenary authority over much of the national economy.

The putative legal rationale for the Section 111(d) proposal is, primarily, based on EPA's claim that the statutory term "best system of emission reduction," and in particular its component term "system," are ambiguous and constitute a significant delegation of authority to regulate electricity production, transmission, distribution, and consumption in an unprecedented and unlimited manner. *See, e.g.*, Proposal, 79 Fed. Reg. at 34,885-86. But Section 111(d)'s narrow terms do not countenance this unlimited assertion of power.

EPA's Section 111(d) proposal makes a fundamental error that leads to reversal of agency action on a regular basis: an argument that Congress's failure to expressly withhold

authority to take some action constitutes a license to do so. But as courts must frequently remind agencies, "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). "Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well." *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995); *see also Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1174-75 (D.C. Cir. 2003) (vacating USPS rule limiting non-profit organizations' use of reduced mailing rates where the Service took the position "that the disputed regulations are permissible because the statute does not expressly foreclose the construction advanced by the agency," which the court determined to be "entirely untenable under well-established case law") (collecting cases).

Taken in context, Section 111(d) has rightly been understood as a regulatory backwater, as Congress never intended it to be a major Clean Air Act regulatory program.

According to EPA, in the 44 years since Section 111(d) was first promulgated as part of the Clean Air Amendments of 1970, only *five* source categories have been subject to regulation under Section 111(d). Mem. at 9-10. Some of these source categories contained as few as 31 sources nationwide,[12] and many were not present throughout the country (for example, phosphate fertilizer plants were found in only 17 states, and primary aluminum plants in only 16).[13] And the only previous 111(d) rule to address common, nationwide sources, the 1996 landfill rule—the only 111(d) rulemaking since 1980—bore projected annual costs of about 1.5% of those of the current proposal.[14] By any relevant metric, the scope of EPA's current Section 111(d) proposal dwarfs these past measures:

	Annualized Costs	**Number of Affected Sources**
Current Proposal	$8.8B ($2011)[15]	1,228[16]
1977 Phosphate Fertilizer Rule[17]	Not specified	53[18]

[12] *See* Table *infra*.

[13] *See Final Guideline Document: Control of Fluoride Emissions from Existing Phosphate Fertilizer Plants*, EPA-450/2-77-005, § 3.1, at 3-5 to 3-15 (Tables 3-3 to 3-6) (Mar. 1977); *Primary Aluminum: Guidelines for Control of Fluoride Emissions from Existing Primary Aluminum Plants*, EPA-450/2-78-049b, § 3.1.1, at 3-3 to 3-5 (Table 3-1).

[14] *See* Table *infra*.

[15] Proposal, 79 Fed. Reg. at 34,839, 34,840 (Table 2).

[16] EPA, *Regulatory Impact Analysis for the Proposed Carbon Pollution Guidelines for Existing Power Plants and Emission Standards for Modified and Reconstructed Power Plants*, at 3-47 (June 2014).

[17] 42 Fed. Reg. 12,022 (Mar. 1, 1977) ("control of atmospheric fluoride emissions from existing phosphate fertilizer plants").

	Annualized Costs	Number of Affected Sources
1977 Sulfuric Acid Plant Rule[19]	Not specified	251[20]
1979 Kraft Pulp Mill NSPS[21]	$200M to $441M[22] (est. $790M to $1.74B in $2011[23])	120[24]
1980 Primary Aluminum Plant Rule[25]	Not specified	31[26]
1996 Municipal Solid Waste Landfill Rule[27]	$90 million[28] (est. $132 million in $2011[29])	312[30]

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[18] *See Final Guideline Document: Control of Fluoride Emissions from Existing Phosphate Fertilizer Plants*, EPA-450/2-77-005, § 3.1, at 3-5 to 3-15 (Tables 3-3 to 3-6) (Mar. 1977).

[19] 42 Fed. Reg. 55,796 (Oct. 18, 1977) ("control of sulfuric acid mist emissions from existing sulfuric acid plants").

[20] *See Final Guideline Document: Control of Sulfuric Acid Mist Emissions from Existing Sulfuric Acid Production Units*, EPA-450/2-77-019, § 2.2.1, at 2-2 (Sept. 1977) ("U.S. production capacity in March 1971 was estimated at 38.6 million short tons and was accounted for by 251 plants.").

[21] 44 Fed. Reg. 29,828 (May 22, 1979) ("control of total reduced sulfur (TRS) emissions from existing kraft pulp mills").

[22] *See Kraft Pulping: Control of TRS Emissions from Existing Mills*, EPA-450/2-78-003b, § 8.5, at 8-34 (Table 8-14) (Mar. 1979).

[23] These cost estimates were expressed in $1976. Calculation obtained at http://www.dollartimes.com/calculators/inflation.htm.

[24] *See Kraft Pulping: Control of TRS Emissions from Existing Mills*, EPA-450/2-78-003b, § 3.1, at 3-1 (Mar. 1979) ("As of December 1975, there were 56 firms operating about 120 kraft pulping mills in 28 states.").

[25] 45 Fed. Reg. 26,294 (Apr. 17, 1980) ("control [of] fluoride emissions from existing primary aluminum plants").

[26] *See Primary Aluminum: Guidelines for Control of Fluoride Emissions from Existing Primary Aluminum Plants*, EPA-450/2-78-049b, § 3.1.1, at 3-1 (Dec. 1979) ("Primary capacity in the U.S. at the end of 1977 was estimated at 5.19 million short tons and was accounted for by 31 plants.") (footnotes omitted).

[27] 61 Fed. Reg. 9,905 (Mar. 12, 1996) ("The emissions of concern are non-methane organic compounds (NMOC) and methane.").

[28] "The nationwide cost of the EG [emission guidelines, *i.e.*, the existing-source rule under Section 111(d)] would be approximately $90 million." 61 Fed. Reg. at 9,916.

The current Section 111(d) proposal would transform this regulatory backwater into the single most intrusive and prominent aspect of the Clean Air Act, by requiring that states formulate plans that change how electricity is generated, supersede traditional state public service commission authority, and affect how consumers use electricity. There is a long history of federal courts invalidating similar attempts by administrative agencies to unmoor limited grants of legislative authority like Section 111(d) from their organic statutes by transforming them into broad mandates that aggrandize agencies' power at the expense of the states and the regulated community. For example, in *Electric Power Supply Association v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), the D.C. Circuit rejected the Federal Energy Regulatory Commission's recent attempt to regulate retail energy demand in the guise of regulating wholesale electric markets, because that regulation would impair states' exclusive right to regulate retail electric markets and lacked any meaningful "limiting principle." *Id.* at 221. The lack of a limiting principle was key, because if this justification for FERC's exercise of its authority prevailed, it could authorize virtually any intrusion on state retail electric market regulatory authority, allowing FERC to arrogate broad authority that Congress did not confer. Notably, the connection between FERC's area of authority (wholesale electricity market) and the challenged regulation (retail energy demand) was considerably more direct than here, and yet the regulation was held to exceed the Commission's statutory authority nonetheless.

Similarly, in *California Independent System Operator Corp. v. FERC ("CAISO")*, 372 F.3d 395, 399 (D.C. Cir. 2004), the D.C. Circuit rejected FERC's attempt to replace the California Independent System Operator Corporation's governing board under its authority to regulate "practice[s]" affecting "rates and charges" in the wholesale electric markets. The court held that the issue is not whether "the word 'practice' is, in some abstract sense, ambiguous, but rather whether, read in context and using the traditional tools of statutory construction, the term 'practice' can encompass the procedures used to select CAISO's board." *Id.* at 400. The court concluded that FERC's construction of "'practice' in this context is . . . a sufficiently poor fit with the apparent meaning of the statute that the statute is not ambiguous on the very question before us." *Id.* at 401 (citing *Brown*, 513 U.S. at 120). In that case, too, the court found the lack of a limiting principle on FERC's assertion of authority critical because of the "staggering" and "drastic implications of [FERC's] overreaching," noting that the agency's reasoning would "apply to its regulation of all other jurisdictional utilities," allowing it "tomorrow without any

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[29]The 1996 Landfill Rule did not specify which year's dollars were used in the cost estimate. Assuming $1995, that translates to $131 million in $2011 (calculation obtained at http://www.dollartimes.com/calculators/inflation.htm).

[30] "The EG will require control of approximately 312 existing landfills." 61 Fed. Reg. at 9,914.

further precedent or any further claim of expanded power" to, for instance, remove and replace Duke's or Dynegy's boards of directors.[31]

This line of authority unquestionably forbids EPA's attempts to interpret the Clean Air Act so as to aggrandize its authority to regulate greenhouse gases in a manner untethered to the historic understanding of the Act. In *Utility Air Regulatory Group v. EPA* ("*UARG*"), 134 S. Ct. 2427 (2014), the Court considered EPA's interpretation of its permitting authority under the Act's prevention of significant deterioration preconstruction permitting program. EPA interpreted these provisions to include greenhouse gases among those pollutants that trigger an emitting source's obligation to obtain certain preconstruction and operating permits, thereby massively expanding the permitting provisions' potential reach beyond anything of which Congress could have conceived at the time it passed the Act. The Court held EPA's interpretation unreasonable in part "because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Id.* at 2444. "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism." *Id.* (internal quotation marks and citation omitted). *See also Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) ("'In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, . . . judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.'") (quoting *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)); *Aid Ass'n for Lutherans*, 321 F.3d at 1175 ("Given the extremity of the effect that results from the Postal Service's interpretation, we would expect to see some indication that Congress intended such an effect, but we find no[ne] in the statute . . . .").

Section 111(d) was never intended to authorize EPA to establish a *de facto* national energy policy. To interpret Section 111(d) in that manner would expand and transform EPA's regulatory authority in ways that Congress never intended. Indeed, the transformation here is even more extreme than the one that the Supreme Court recently rejected in *UARG*. There, EPA "merely" proposed to rewrite a pre-existing permitting regime to include greenhouse gases, largely (but not solely) in situations where industrial sources would already have to obtain preconstruction or operating permits. But in the case of Section 111(d), the agency proposes to create a new regulatory program from whole cloth that applies without limitation to all fossil fuel-fired power plants and any other source "roped in" by a state or EPA in a manner that constitutes centralized energy and economic reorganization. To say the least, "skepticism" is all the more appropriate in the face of such a sweeping proposal, *UARG*, 134 S. Ct. at 2444. Whatever gaps or ambiguities EPA purports to discover and interpret in the Clean Air Act, the

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[31] Another important consideration in the *CAISO* case was the conflict that this action would cause with other federal statutes, yet another unlawful characteristic of the Section 111(d) proposal that is discussed in detail below. 372 F.3d at 404; *see infra* Section VI.

agency cannot bootstrap them into providing it "an unheralded power to regulate" the states' energy sectors, *id.*

To make the situation worse for EPA, the sweeping assertion of authority in its Section 111(d) proposal not only violates the Clean Air Act's text and structure, but also infringes on a traditional area of state authority. As a result, the Section 111(d) proposal implicates black-letter precedent requiring Congress to provide an extremely clear statement of its intent to authorize such an intrusion on the state's traditional police powers.

Most recently, in *Bond v. United States*, 134 S. Ct. 2077 (2014), the Supreme Court overturned the conviction of a Pennsylvania woman under the implementing legislation for the Chemical Weapons Convention. "Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach." *Id.* at 2083. This reasoning is not limited to the criminal context, but derives from the broader principle that "'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Id.* at 2089 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). In other words, "it is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute." *Id.* at 2090. Finding no "clear statement that Congress meant the statute to reach local criminal conduct," the court held that the statute did not do so. *Id.*

Similarly, in *American Bar Association v. FTC*, 430 F.3d 457 (D.C. Cir. 2005), the D.C. Circuit held that the FTC could not regulate attorneys under the Gramm-Leach-Bliley Act on the theory that attorneys and their law firms were "financial institutions" because they were "entities engaged in 'financial activities.'" *Id.* at 466. At *Chevron* step one, the court determined that the statute's broad definition of "financial institution" was not ambiguous in the manner asserted by the FTC, in part because the court found "it difficult to believe that Congress, by any [latent] ambiguity, intended to undertake the regulation of the profession of law—a profession never before regulated by 'federal functional regulators'—and never mentioned in the statute." *Id.* at 469. And at *Chevron* step two, the court determined that, even if the statute were ambiguous in the necessary sense, under *Gregory* and other precedent, Congress had not made the requisite clear statement that it intended to alter the usual constitutional balance by invading areas of traditional state sovereignty. *Id.* at 471-72.

Simply put, Congress has given no clear indication of its intent to authorize EPA to invade state authority to decide energy and resource-planning policy. *Bond* and *American Bar Association* reinforce the fact that under the "usual constitutional balance," these are areas of traditional state jurisdiction, and that any arguable ambiguity found, for instance, in the breadth of terms such as "system of emission reduction" must be resolved in the states' favor by reference to the "basic principles of federalism."

IV. Section 111(d) Limits EPA's Role in the First Instance to Procedure, Not Substance

Consistent with Congress's view of Section 111(d) as a limited program for filling a minor regulatory gap for certain minor categories of sources, Section 111(d) limits EPA's role to one of procedure. EPA may promulgate regulations to establish a "*procedure*" under which

states submit implementation plans that establish standards of performance for existing sources subject to regulation under Section 111(d). But the states, in developing their implementation plans, are the ones on whom Congress conferred authority to actually establish "standards of performance" for existing sources. *See* 42 U.S.C. § 7411(d)(1) (directing EPA to "prescribe regulations which shall establish a *procedure* . . . under which each State shall submit to the Administrator a plan" that establishes standards of performance) (emphasis added). *Compare* § 7411(b)(1)(B) (directing EPA to "establish[] Federal *standards* of performance for new sources" directly) (emphasis added).

EPA promulgated general "implementing regulations" under Section 111(d) in 1975. *State Plans for the Control of Certain Pollutants from Existing Facilities*, 40 Fed. Reg. 53,340 (Nov. 17, 1975), *codified as amended at* 40 C.F.R. §§ 60.22-60.29. Under these regulations, EPA may promulgate "emission guidelines" that reflect EPA's opinion as to the degree of emission reduction achievable through the "best system of emission reduction" that the agency believes to be "adequately demonstrated" for the regulated existing sources. *See* 40 C.F.R. §§ 60.21(e) (defining "emission guideline"), 60.22(b)(5). But the states are expressly authorized by the Clean Air Act to apply less stringent standards to individual sources or classes of sources. 42 U.S.C. § 7411(d)(1). In so doing, *states*—not the EPA—consider cost, practical achievability, a source's "remaining useful life," and other source-specific factors when applying these standards to particular sources. *Id.*; *see also* 40 C.F.R. § 60.24(f).

Only when a state fails to submit a satisfactory implementation plan—that is, one that is unreasonable or fails to comport with the Act's statutory criteria—is EPA authorized to perform its second function under 111(d)(2): directly prescribing binding standards for sources. *See* 42 U.S.C. § 7411(d)(2); *see also* 40 C.F.R. § 60.27(c)(3). *Cf. Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 494 (2004) (ultimate issue in Prevention of Significant Deterioration program is whether state agency's determinations are "reasonable, in light of the statutory guides and the state administrative record").

EPA's proposal pays lip service to this process while blatantly violating it. The proposal sets a mandatory, binding "goal" for each state, in the form of an emission rate for the state's entire power sector. Under EPA's proposal, once these "goals" are finalized, states will have no discretion to alter them. *See, e.g.*, Proposal, 79 Fed. Reg. at 34,835 ("Once the final goals have been promulgated, a state would no longer have an opportunity to request that the EPA adjust its CO_2 goal."), 34,897-98 (rejecting stakeholder suggestion that states be allowed to quantify levels of emission reduction or otherwise treat EPA's goals "as advisory rather than binding"), 34,892 ("As promulgated in the final rule following consideration of comments received, the interim and final goals will be binding emission guidelines for state plans.").

In fact, even if a state can demonstrate that it cannot meet EPA's projected emission reductions by implementing a particular aspect of the proposed "best system of emission reduction," EPA will not adjust the state's "goal" unless the state demonstrates that it cannot realize additional reductions from applying the *other* aspects of that "system" more aggressively, or from "related, comparable measures." *Id.* at 34,893. The proposal thus violates Congress's unambiguously expressed intent in Section 111(d).

EPA argues that states will still have the flexibility to apply less stringent standards to individual sources, but this elides the real issue. *See* Proposal, 79 Fed. Reg. at 34,925-26. Given the flexibility afforded to states under Section 111(d)'s plain text, valid state implementation

plans may result in a range of actual state-wide emission rates. As the states exercise their authority to appropriately adjust EPA's "guidelines" for certain sources and classes of sources, the sources across a given state may in the end collectively emit a substance at a greater or lesser rate. And there is nothing unusual about this result, because before now EPA has properly restricted its 111(d) regulations to set guidelines for source emissions—*not* total state emissions.

EPA attempts to justify this by reference to the statutory definition of "standard of performance" as "a standard for emissions which reflects the *degree* of emission limitation achievable through the application of the best system of emission reduction." 42 U.S.C. § 7411(a)(1) (emphasis added). EPA reads "degree" to mean "portion," and offers the interpretation that "[t]hat 'degree' or portion of the required emission performance level is, in effect, the portion of the state's obligation to limit its affected sources' [aggregate, statewide] emissions that the state has assigned to each particular affected source." Proposal, 79 Fed. Reg. at 34,891. But EPA offers no authority, not even a dictionary citation, for construing "degree" as "portion." And the agency offers no statutory basis for a state's putative obligation to limit its sources' *aggregate* emissions, because there is none whatsoever. States "*establish*" standards of performance "for existing source[s]," thereby setting *those individual sources'* obligations to limit their emissions. The concept of a predetermined aggregate cap under which the *state* parcels out "portions" of *its* limitation obligation has no basis in the implementing regulations or EPA's past practice under 111(d), let alone in the Act itself. EPA's proposal also contradicts itself, as it defines "emission performance level" as "the level of emissions performance for affected entities specified in a state plan." *Id.* at 34,956 (text of proposed rule). That definition describes something already existing under the statute and defined in EPA's regulations: it is precisely the "standard of performance" which the *state* establishes for existing sources under 111(d)(1). But as quoted above, Proposal, 79 Fed. Reg. at 34,891, EPA speaks of sources being "assigned" a portion of a statewide "emission performance level." The agency cannot spin statutory authority for itself out of air simply by multiplying regulatory definitions for terms of its own invention found nowhere in the Act.

In essence, EPA here treats each state as nothing more than a giant source of carbon dioxide, and imposes on each state binding, inflexible emission limits. The so-called "flexibility" offered to states here is no greater than the flexibility a regulated *source* always enjoys under the Clean Air Act, because individual sources can devise alternative methods to reach emission levels prescribed by EPA. *See, e.g.*, 42 U.S.C. § 7411(b)(5), (h) (forbidding EPA to require installation of particular technological systems absent narrowly specified circumstances). But *states* are entitled to flexibility not only in procedural means but also in substantive ends. EPA's proposal reverses this statutory scheme, promoting the agency to the role of setting binding, substantive standards in the first instance and relegating the states to a ministerial, administrative role. In this, EPA claims the authority to strip states of their statutory discretion to take account of their unique circumstances, needs, and interests.

If EPA can ever issue lawful Section 111(d) rules regulating coal-fired power plants—that is, after first having withdrawn its regulation of those power plants under Section 112, and then having issued lawful regulations for new power plants under Section 111(b)—EPA still must adopt a wholly different approach to Section 111(d) regulation than the one it takes in the present proposal. Under this alternative, lawful approach, EPA would analyze the types of projects that could reduce greenhouse gas reduction at existing sources of coal-fired power plants

by reference to Section 111's criteria, which considers such factors as cost and performance in arriving at guidelines about what emission rates are actually achievable as the "best system of emission reduction" for various categories and subcategories of fossil-fuel-fired power plants. EPA has completed some of this work with its first "building block," efficiency improvements at power plants, but even that proposal is flawed because it overestimates the efficiency improvements that are available at individual power plants by considering this matter on a statewide basis. Under this lawful approach, states would then establish and apply standards of performance to existing power plants, drawing on their local knowledge and considering the individual sources and classes of sources within their jurisdictions. This approach would honor the proper roles of the federal and state governments and result in performance standards that are appropriate for and achievable by regulated sources.

V. Section 111(d) Is Limited to Source-Level, Inside-the-Fenceline, Unit-by-Unit Emission Reduction Measures

Section 111(d) unambiguously mandates that, where other statutory prerequisites are satisfied, *see supra* Section II., states must establish standards of performance applicable to *individual sources* of pollutants. *See, e.g.*, 42 U.S.C. § 7411(d)(1)(A) (state plans "establish[] standards of performance *for any existing source . . . to which* a standard of performance under this section would apply if such existing source were a new source") (emphasis added). EPA's proposal radically departs from this approach. The agency proposes to determine that the "best system of emission reduction" for power plants is composed of four "building blocks." *See, e.g.*, Proposal, 79 Fed. Reg. at 34,835. Only the first "building block"—efficiency gains from heat-rate improvements achieved "inside the fenceline" of particular coal plants—is arguably authorized under 111(d). *See id.* at 34,859-62; *but cf. UARG*, 134 S. Ct. at 2448 ("assuming without deciding" that another provision of the Act "may be used to force some improvements in energy efficiency" while stressing that "important limitations" must be observed to guard against "'unbounded' regulatory authority," even where EPA regulates only *inside-the-fenceline* energy efficiency).

The other three "building blocks" envision the reshaping of state resource-planning and energy policy, in the form of shifting generation from coal- to gas-fired plants, shifting generation from fossil fuels altogether to renewable resources, and end-use efficiency measures. *See* Proposal, 79 Fed. Reg. at 34,862-75. And while EPA does not formally require states to employ a precise *mixture of* these "outside-the-fenceline" measures, the state "goals" are stringent enough that they cannot be met by the first "building block" alone. (Indeed, the agency does not suggest that they can be.) Many state "goals" are set well below the rate achievable by even a state-of-the-art gas-fired plant, let alone a coal-fired one. *See id.* at 34,895 (Table 8–Proposed State Goals). These "goals" can only be met by substantial revision of a state's sector-wide approach. The "best system of emission reduction" proposed here is therefore a *de facto* national energy policy.

This type of regulatory adventurism contradicts the Supreme Court's recent decision in *UARG*. There, the Court considered limitations on the scope of EPA's authority in requiring sources to apply "best available control technology" for greenhouse gases under the prevention of significant deterioration preconstruction permitting program. The Court observed that such

"control technology" cannot require "fundamental redesign" of facilities, is "required only for pollutants that the source itself emits," and "should not require every conceivable change that could result in" improvements. 134 S. Ct. at 2448.

Notably, "performance standards" under Section 111 are closely linked to "best available control technology" by express definition and by statutory context. EPA's 111(d) proposal exceeds those limitations by requiring "fundamental redesign" not only of individual facilities but of a state's entire energy sector and by proposing measures far removed from at-the-source emissions.

First, the program-specific definitions of "best available control technology" and "performance standards"—found, respectively, in the prevention of significant deterioration program and in the new- and existing-source performance standards program (i.e., Section 111)—are highly similar. "Best available control technology" is defined as "an *emission limitation* based on the *maximum degree* of reduction . . . *achievable* for [a] facility." CAA § 169(3), 42 U.S.C. § 7479(3) (emphases added). And "standard of performance" is defined as "a standard for emissions of air pollutants which reflects the *degree of emission limitation achievable* through the application of the best system of emission reduction which . . . has been adequately demonstrated." 42 U.S.C. § 7411(a)(1) (emphasis added). In other words, both terms are defined by reference to "emission limitation"; the primary difference is that "best available control technology" represents the most stringent limitation achievable, whereas "performance standards" are not defined by maximum possible stringency, but by the "best system . . . adequately demonstrated." This relationship is confirmed by the fact that the definition of "best available control technology" explicitly links the two phrases: "best available control technology" must be at least as stringent as Section 111 standards. 42 U.S.C. § 7479(3) ("In no event shall application of 'best available control technology' result in emissions . . . which will exceed the emissions allowed by any applicable standard established pursuant to" 111). The former is simply intended to be a stricter version of the latter.

Second, the Act's general definitions of "emission limitation" and "performance standards" are also closely related. "Emission limitation" is defined at CAA § 302(k), 42 U.S.C. § 7602(k) as "a requirement . . . which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement related to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter." And "performance standards" are defined, in the subsection immediately following, as "a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction." CAA § 302(*l*), 42 U.S.C. § 7602(*l*). Both terms refer to requirements that cut emissions on a continuous basis, and both are illustrated by the same "including any requirement . . ." phrase. The major difference is that "emission limitation" is given another "including" phrase ("any design, equipment . . ."). In other words, "emission limitations" arguably encompass a broader range of measures than do "performance standards." And because the definition of "performance standards" only contains the "including" phrase that expressly refers to "the operation or maintenance of a source," any confining of "emission limitation"—and therefore of "best available control technology," which, recall, is expressly defined at § 7479(3) as an "emission limitation"—to inside-the-fenceline measures should apply with equal or greater force to "performance standards."

Third, certain provisions of the 2005 Energy Policy Act confirm that "best available control technology" and Section 111 "performance standards" are linked concepts. Congress restricted EPA's ability to rely on data from facilities receiving assistance under that Act when it sets either of these types of standards under the Clean Air Act, *see* 42 U.S.C. § 15962(i). (As discussed at Section II *supra*, EPA's violation of this restriction is one of the reasons why EPA's proposed New Source Rule is unlawful and will not survive review.) Even when drafting legislation that primarily addressed another subject area (energy policy as opposed to pollution control), Congress was mindful of the close relationship between these two terms.

Fourth, at oral argument in *UARG*, the Solicitor General made this argument in an attempt to prevail: "Section 7411 and the PSD program are not aimed at different problems. They are aimed at the same problem, and you can see that from the statutory text. . . . Congress specifically linked the operation of the Section 7411 standards and the Best Available Control Technology under the PSD program. . . . [O]nce Congress has set a standard under Section 7411, . . . that becomes a floor for the evaluation of Best Available Control Technology." *UARG*, No. 12-1146, Transcript of Oral Argument at 46-48 (Solicitor General Verrilli, Feb. 24, 2014). On this point, the government was entirely correct. The two address the same problem and take the same form—how else could one set a "floor" for the other?—and should therefore be subject to the same limitations.

EPA's justifications for not stopping at the fenceline are specious and contrary to the statutory text. *See* Proposal, 70 Fed. Reg. at 34,856. EPA argues that the word "system" in the statutory phrase "best system of emission reduction" is broad enough to encompass these "outside-the-fenceline" measures. *See id. at* 34,885-86 (relying on dictionary definition of "system" as "[a] set of things working together as parts of a mechanism or interconnecting network").

But Section 111 does not actually grant EPA authority to regulate a "system." Rather, the statute provides that EPA and the states may set standards for emissions based on "*the application of* the best system of emission reduction." 42 U.S.C. § 7411(a)(1) (emphasis added). This statutory phrase directs the agency (in the new-source, 111(b) context) or the state (in the existing-source, 111(d) context) to establish standards of performance by applying the "system of emission reduction" *to the individual sources* with the source category being regulated. (In keeping with this, the 111(a) definition section defines "new source" and "stationary source" immediately after defining "standard of performance." *Id.* § 7411(a)(2), (3).)

The term "standard of performance" itself can only be understood in context of a source-specific limit, as it is defined as "a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance *of a source* to assure continuous emission reduction." *See* CAA § 302(*l*), 42 U.S.C. § 7602(*l*) (emphasis added). Indeed, the meaning of the term "application" in the context of a standard for emissions recurs throughout the Act and can only be understood in the context of an individual source. Considering again Section 169(3) of the Act, defining the "best available control technology" ("BACT") that must be applied to new or modified sources under the prevention of significant deterioration program, the Act provides that "[i]n no event shall *application of* [BACT] result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to" Sections 111 or 112. 42 U.S.C. § 7479(3) (emphasis added). Similarly, the definition of lowest achievable emission rate ("LAER") for the nonattainment new source review program provides that "in no event shall the *application of* [LAER] permit a proposed new or modified source to

emit any pollutant in excess of the amount allowable under applicable new source standards of performance." CAA § 171(3), 42 U.S.C. § 7501(3) (emphasis added). Put another way, whatever the "best system" is, it must be a system that reduces emissions from *a particular source* "to which a standard of performance under this section would apply if such existing source were a new source." 42 U.S.C. § 7411(d)(1)(A)(ii).

Even if EPA did have authority to regulate a "system," its proposed regulation here would fail. "The definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). In the context of emission control, the Clean Air Act displays a consistent and clear pattern of referring to "systems" as source-specific measures.[32] "Best system of emission reduction" as used in Section

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[32] *See, e.g.*, CAA § 110(j), 42 U.S.C. § 7410(j) (conditioning issuance of all permits required under Title I on a showing by the owner or operator of each new or modified stationary source "that the technological *system* of continuous emission reduction *which is to be used at such source* will enable it to comply with the standards of performance which are to apply to such source . . . .") (emphases added); CAA § 111(b)(5), 42 U.S.C. § 7411(b)(5) (providing that, except as authorized under subsection (h), the Administrator may not require "any new or modified source *to install and operate* any particular technological *system* of continuous emission reduction to comply with any new source standard of performance") (emphases added); CAA § 112(r)(7)(A), 42 U.S.C. § 7412(r)(7)(A) (providing that accidental-release-prevention regulations may "make distinctions between various types, classes, and kinds of facilities, devices and *systems* taking into consideration factors including, but not limited to, the size, location, process, process controls, quantity of substances handled, potency of substances, and response capabilities present *at any stationary source*") (emphases added); CAA § 169(3), 42 U.S.C. § 7479(3) (defining best available control technology, or BACT, as an "emission limitation based on maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable *for such facility* through application of production processes and available methods, *systems*, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant") (emphasis added); CAA § 206(a)(2), 42 U.S.C. § 7525(a)(2) ("The Administrator shall test any emission control *system incorporated in a* motor vehicle or motor vehicle engine submitted to him by any person . . . .") (emphasis added); CAA § 206(a)(3)(A), 42 U.S.C. § 7525(a)(3)(A) (Administrator may issue a certificate of conformity only if the manufacturer establishes "that any emission control device, *system*, or element of design *installed on, or incorporated in*, such vehicle or engine conforms to applicable requirements . . . .") (emphases added); CAA § 207(c)(3)(A), 42 U.S.C. § 7541(c)(3)(A) ("The manufacturer shall provide in boldface type on the first page of the written maintenance instructions notice that maintenance, replacement, or repair of the emission control devices and *systems* may be performed by any automotive repair establishment or individual . . . .") (emphasis added); CAA § 402, 42 U.S.C. § 7651a(7) (defining "continuous emission monitoring *system*" as "the *equipment* as required by section 7651k of this title . . . .") (emphases added)); CAA § 415, 42 U.S.C. § 7651n(c) (providing that a coal-fired utility's physical or operational changes

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111 falls within the statute's norm, rather than the exception: "systems" limiting emissions are source-specific unless indicated otherwise. The Section governs the issuance of performance standards, and "standard of performance" is defined at § 7602(*l*) to mean "a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction." The *only* example given in this definition is expressly source-specific. In the few instances where the Clean Air Act intends the term "system" to refer to a geographically dispersed "set of things," it does so expressly, as in Section 319(a) of the Act, directing the Administrator to "promulgate regulations establishing an air quality monitoring system throughout the United States." 42 U.S.C. § 7619(a).

In this regard, EPA's attempt to take the term "system" out of context is akin to the situation that the Supreme Court faced in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994). There, the Supreme Court rejected the agency's position that its decision to make tariff filing optional for all nondominant long-distance carriers was within its statutory authority to "modify any requirement" under 47 U.S.C. § 203. *Id.* at 225. Despite the seeming breadth of the term "modify," the court determined that the word's plain meaning is to make a *moderate* change, whereas the challenged order made a "radical or fundamental change." *Id.* at 228-29. Instead, by "eliminat[ing a] crucial provision of the statute for 40% of a major sector of the industry," the agency had engaged in "a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934." *Id.* at 231-32. The order "is effectively the introduction of a whole new regime of regulation," *id.* at 234.

By going beyond source-level, inside-the-fenceline measures, EPA's proposal would expand 111(d), and specifically the underlying statutory term "best system of emission reduction," into "a whole new regime of regulation": one that regulates not only pollutant emission by sources, but a state's entire resource and energy sectors.

And notably, courts have in the past rejected a similar attempt by EPA to re-define the fundamental level at which Section 111's "best system of emission reduction" applies by disaggregating that concept from the concept of an individual source as defined by statute. In *ASARCO Inc. v. EPA*, 578 F.2d 319, 326-27 (D.C. Cir. 1978), the D.C. Circuit invalidated EPA regulations interpreting Section 111(a)(3)'s definition of "stationary source" to "allow a plant operator who alters an existing facility in a way that increases its emissions to avoid application of the NSPSs by decreasing emissions from other facilities within the plant." *Id.* at 325. EPA argued that the broad statutory definition gave it "'discretion' to define a stationary source as

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will not trigger Section 111 applicability where, among other conditions, the unit was inactive for 2 years prior to the 1990 Amendments and "*was equipped* prior to shutdown with a continuous *system* of emissions control" that met certain technical standards) (emphases added).

either a single facility or a combination of facilities." *Id.* at 326. (This type of aggregation is known as the "bubble concept," *e.g.*, *id.* at 321.)

The court disagreed, holding that the "regulations plainly indicate that *EPA has attempted to change the basic unit to which the NSPSs apply . . . .*" *Id.* at 326-27 (emphasis added). (*See also id.* at 322: "The basic controversy in the cases before us concerns the determination of the units to which the NSPSs apply.").[33] In the current Section 111(d) proposal, EPA takes the even more egregious action of changing the field of regulation from *sources* to *a state's entire power sector.* Given that EPA lacks the authority to expand "performance standards" to apply collectively to all regulated facilities at a *single industrial site*, it is not credible to suggest that the "best system of emission reduction" underlying such standards can encompass measures adopted throughout *the state's entire power sector.*

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[33] *ASARCO* does not conflict with the Supreme Court's decision six years later in *Chevron*, holding that the "bubble concept" was appropriate in the context of the nonattainment new source review program. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Whereas *ASARCO* considered the definition of "stationary source" provided in and for Section 111, *Chevron* construed the *undefined* use of the term "major stationary sources" in § 172(b)(6) of the Act (then codified at 42 U.S.C. § 7502(b)(6), with its post-1990 equivalent now found at § 7502(c)(5)).

Section 172(b)(6), added in the 1977 Amendments as part of a new program addressing areas that failed to attain national ambient air quality standards, required state implementation plans under the NAAQS program to "require permits for the construction and operation of new or modified major stationary sources." *See Chevron*, 467 U.S. at 849 & n.22 ("The focal point of this controversy is one phrase in that portion of the [1977] Amendments. . . . Specifically, the controversy in these cases involves the meaning of the term 'major stationary sources' in § 172(b)(6) of the Act . . . ."). The Supreme Court acknowledged the *ASARCO* ruling in three footnotes with no suggestion of disapproval; the two opinions simply construe different terms in different statutory programs. *See id.* at 841 & n.6, 847 n.17, 857 n.29.

The Supreme Court has long maintained that the NSPS and new source review programs have different purposes, with the NSPS program being technology-forcing, and the new source review program being ambient-air-quality focused. *See generally Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 565 (2007) (holding court of appeals erred in requiring EPA to conform its regulations under prevention of significant deterioration program, which is closely linked to new source review program, with "their NSPS counterparts"). Those different purposes apply directly when considering the unit at which state-of-the-art control technology must be employed, the question decided for the NSPS program in *ASARCO.*

Moreover, the decisional criteria applied in *ASARCO* are consistent with those that the Supreme Court later employed in *Chevron*: the *ASARCO* court expressly noted that EPA is entitled to deference when interpreting the Act, *ASARCO*, 578 F.2d at 325, and described the court's role as determining whether an interpretation is "sufficiently reasonable," *id.* at 326 (internal quotation marks omitted). Indeed, *ASARCO* recites as controlling precedent on this point the very same cases which *Chevron* would later follow. *Compare id.* at 326 nn.21, 22 (citing, *inter alia*, *Union Electric Co. v. EPA*, 427 U.S. 246, 256 (1976), *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975)), *with Chevron*, 467 U.S. at 843 nn.11, 14 (same).

EPA also argues that it bases its proposed "building blocks" on measures that states are already undertaking. Proposal, 79 Fed. Reg. at 34,856. But a state's exercise of its own policy discretion cannot confer regulatory authority on a federal agency. And EPA expresses concern that, if it limited its proposal to heat-rate improvements achieved inside the fence at individual coal-fired plants, a "rebound effect" would increase operations at these plants and lead to smaller overall reductions. *Id.* at 34,856 & n.93. But the "rebound effect" is nothing new in environmental law. *See, e.g.*, 75 Fed. Reg. 74,152, 74,316-20 (Nov. 30, 2010) (providing detailed discussion of "rebound effect" in fuel-efficiency context). It has never been used as a justification to set state energy policy or otherwise enlarge EPA's authority, and it cannot bear that weight here. EPA also asserts that its additional, beyond-the-fenceline "building blocks" promise additional emission reductions "by significant amounts and at lower costs" than some strategies within the first, inside-the-fenceline "building block." Proposal, 79 Fed. Reg. at 34,856. But even assuming this is true, it is only a reason to propose these measures *if* they are within the agency's power to propose.

EPA hides behind a fig leaf of federalism and flexibility while in effect forcing major changes to the states' administration of electricity generation and consumption. But the radical nature of its proposal becomes all the more evident when one considers what will occur if a state does not submit an implementation plan, or if EPA finds a submitted plan unsatisfactory. The agency will then prescribe a *federal* implementation plan for that state, as authorized by 42 U.S.C. § 7411(d)(2). This plan would apply the range of "building blocks" to the state. That is to say, it would set binding emission limits for coal- and gas-fired power plants that would switch the way that sources are allowed to dispatch, set renewable portfolio requirements that would force electric utilities and others to develop renewable resources against their will in order to be allowed to continue operating existing coal-fired assets, and set the same type of efficiency standards for consumers of electricity that the D.C. Circuit recently invalidated when FERC attempted to do so. This total federal invasion of a state power sector would remove all pretext and expose the true extent of this proposal's violation of state authority. While this would provide clarity, such a catastrophe for federalism is antithetical to the Constitution and cannot be justified under any provision of federal law.

VI. EPA's Proposal Conflicts with the Federal Power Act

The question of what role the federal government and its agencies should play in developing energy policy throughout the country has been considered extensively under the Federal Power Act, Congress's definitive pronouncement on the subject. And while Congress unquestionably did not intend Section 111 as an energy-policy provision at all, assuming *arguendo* that it were capable of being construed to touch on energy policy issues in some meaningful way, such as what type of resources may be used to generate electricity in different states, how state and regional power grids should dispatch power, retail energy-efficiency measures, and the like, then EPA's Section 111(d) proposal directly contravenes Congress's careful decision in the Federal Power Act to preempt only certain aspects of power generation.

If EPA were allowed to capitalize on Section 111(d) to regulate the electric power sector in some manner other than as individual emission sources, then the section "serve[s] the same function" and "relate[s] to the same thing" as the Federal Power Act, and should be interpreted

together with it. *See* 2B Sutherland, Statutes & Statutory Construction, § 51:3 (7th ed. 2007) (footnotes omitted) ("Statutes are *in pari materia*—pertain to the same subject matter—when they relate to the same person of thing, to the same class of person or things, or have the same purpose or object."); *see also Erlenbaugh v. United States*, 409 U.S. 239, 245 (1972) (statutes "intended to serve the same function" are construed together); *United States v. Freeman*, 44 U.S. (3 How.) 556, 564-65 (1845) ("The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them . . . ."). This interpretive mandate is based on the "assum[ption] that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject." *Erlenbaugh*, 409 U.S. at 244. It is a "tool of statutory construction [that] allows us to consider all statutes that relate to the same topic; therefore, if a thing in a subsequent statute comes within the reason of a former statute, we transpose the former statute's meaning to the thing in the subsequent statute." *United States v. Rodriguez*, 60 F.3d 193, 196 (5th Cir. 1995) (citing *Freeman*).

EPA argues it can use Section 111(d) to address these issues because Congress did not expressly constrain it from doing so. But "[w]here a problem of interpretation was apparently not foreseen by Congress, it is appropriate to consult and be guided by those areas covering the same subject where the expression of legislative intent is clear." *U.S. v. Stauffer Chem. Co.*, 684 F.2d 1174, 1187 (6th Cir. 1982). In the Federal Power Act, Congress's intent was clear: it expressly delineated federal and state jurisdiction over the electric industry. In this regard, the Federal Power Act carefully limits federal authority over the sale of electricity to the transmission and sale at wholesale of electric energy in interstate commerce while expressly disclaiming authority over other matters, such as the generation and local distribution and transmission of electricity, which are reserved for their traditional state regulators:

> The provisions of this subchapter [*i.e.*, subchapter II of the Federal Power Act] shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, *but* except as provided in paragraph (2) *shall not apply to any other sale of electric energy* or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, *but shall not have jurisdiction*, except as specifically provided in this subchapter and subchapter III of this chapter [*i.e.*, Licensees and public utilities: Procedural and administrative provisions], *over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce*, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

16 U.S.C. § 824(b)(1) (emphases added).[34]

It defies belief to suggest that Congress established as a background principle in the Federal Power Act that federal authority over intrastate energy production, transmission, and distribution (both in itself and through the corresponding subject of electricity sales) was precluded unless specifically provided elsewhere, only to *sub silentio* grant EPA authority under Section 111(d) of the Clean Air Act to address all these aspects of that industry without establishing any delineation of federal and state jurisdiction. *Cf. Boumediene v. Bush*, 553 U.S. 723, 777 (2008) ("If Congress had envisioned [Detainee Treatment Act] review as coextensive with traditional habeas corpus, it would not have drafted the statute in this manner.") (noting absence of savings clause in that Act). If Congress had intended to grant EPA regulatory authority under Section 111(d) to address, as such, states' energy-generation and energy-efficiency policies, it "would not have drafted [Section 111] in th[e] manner" that it did. Instead, it would have laid out a scheme of bifurcated jurisdiction similar to the one it designed in the Federal Power Act. Its total omission of such a scheme shows that it had no such intent.

Congress made a conscious decision in the Federal Power Act not to regulate the generation and distribution of retail electricity precisely because "[t]he FPA authorized federal regulation not only of wholesale sales that had been beyond the reach of state power but also the regulation of wholesale sales that had been *previously subject* to state regulation." *New York v. FERC*, 535 U.S. 1, 21 (2002). In other words, even when Congress was unambiguously invading traditional areas of state regulation, it was careful to limit the extent of the invasion through a savings provision. "[A]ware of [that] previous statute[]," *Erlenbaugh*, 409 U.S. at 244, Congress in subsequently enacting the Clean Air Act surely did not expand another agency's regulatory purview over those areas without limit. *Cf. Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000) ("[T]his Court has repeatedly 'decline[d] to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'") (second alteration in original) (quoting *United States v. Locke*, 529 U.S. 89, 106 (2000)). The situation here is precisely the opposite. If, in light of EPA's assertion of authority to address all aspects of the power sector under Section 111, we do *not* read that section in light of the Federal Power Act's savings clause, we "upset the careful regulatory scheme established by federal law." *See, e.g., Union Pac. R.R. Co. v. Cal. Pub. Utils. Comm'n*, 346 F.3d 851, 864 n.17 (distinguishing *Locke* where statute in question addresses area that "[p]rior to that time . . . was largely regulated by the states").

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[34] *See also id.* 16 U.S.C. § 824(a) ("It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.*") (emphasis added).

The appropriate response when an agency so brazenly reaches beyond its delegated authority is the one given by the court in *CAISO*. There, FERC argued that its statutory authority to address "'practice[s] . . . affecting [a] rate'" gave it authority to address "the composition of the governing board of a utility and the method of its selection." 372 F.3d at 399 (second and third alterations in original) (quoting 16 U.S.C. § 824e(a)). The agency relied on the breadth of the statutory term "practice," and "apparently would have [the court] hold that the existence of an 'infinitude' of practices supposes that there is also an infinitude of acceptable definitions for what constitutes a 'practice' to give it the authority *to regulate anything done by or connected with* a regulated utility . . . . We are not biting." *Id.* at 401 (emphasis added) (quoting *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985)). The court struck down the agency's interpretation at *Chevron* step one, *id.* at 400, 401.

After concluding that FERC impermissibly stretched the statutory term "practice," the court confirmed its conclusion by considering "the implications of FERC's amorphous defining of the term." *Id.* at 402. "Were we to uphold this theory, the implications would be staggering." *Id.* at 403. But "we really need reach no . . . parade of horribles," because

> [t]he very act attempted by FERC in this case is quite enough to reveal the drastic implications of its overreaching. . . . Congress has created in Title 15 of the United States Code a Securities and Exchange Commission with extensive powers over corporate regulation. Every state has statutes affecting corporate governance. Presumably the members of the federal and state commissions charged with securities and corporate regulation are chosen with an eye to their expertise in matters corporate. Certainly the legislative bodies have given them powers with a view to that subject matter. The same cannot be said of the legislative empowerment of FERC, nor presumably are its members chosen principally for their expertise in corporate structure.

Id. at 404. The same applies here. Congress created in the Federal Power Act a scheme of extensive (but *carefully delineated*) federal regulatory authority over the energy sector. And the states, of course, have their own statutory and regulatory systems that address those aspects of their energy sectors that Congress has reserved to their jurisdiction. EPA's legislative empowerment to regulate pollution emissions from stationary sources cannot plausibly be read to cut across this complex scheme of federal and state regulation.

To confirm that EPA is regulating in an area over which it lacks the requisite "legislative empowerment" and "expertise," one need only look at the reaction to its proposal. Multiple state and federal regulators and stakeholders have expressed grave concern that the proposal—especially because it lacks any formal cooperation with and input from FERC—threatens grave impacts on the reliability and affordability of the nation's energy supply, particularly in its ability to respond to demand spikes in response to extreme weather events. EPA's proposal requires states to undergo significant shifts in energy policy, but Congress never intended EPA to be an energy regulator. Congress's wisdom in that regard is evident from the serious risks posed by EPA's attempt to act in that area without the necessary authorization and experience.

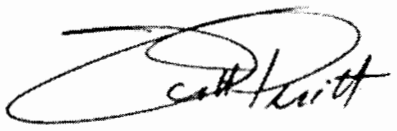
Taking at face value EPA's baseless assertion that Section 111 empowers it to address a state's energy sector as such, basic principles of statutory interpretation require us to evaluate that assertion in light of the Federal Power Act. But where that Act establishes federal authority over the energy sector, it does so with express, detailed attention to demarcating federal and state jurisdiction. The absence from Section 111 of any such attention confirms that EPA's assertion of authority is not correct.

VII. Conclusion

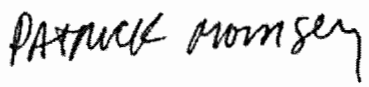
EPA's proposal violates both the letter and the spirit of the Clean Air Act. It violates the "literal" terms of the Clean Air Act, as EPA has itself conceded. Mem. at 26. It has not been promulgated after the adoption of lawful new source rules under Section 111(b). It departs from statutory authority and regulatory tradition to set energy policy for the states. It departs from the appropriate system of "cooperative federalism" by relegating states to an administrative role in place of their proper substantive one. It treats states as nothing more than giant sources of carbon dioxide emissions. It requires states not only to regulate inside-the-fenceline improvements, but also to make sweeping changes to substantially all aspects of their power sectors. It does all this in the face of an explicit statutory prohibition.

This proposal threatens the states' core interests, the proper functioning of their resource and energy policies, and the very federal structure of our government. The commenting states have an obligation to their citizens to vigorously resist this unlawful proposal. EPA should immediately withdraw the proposal, and if it does not do so, EPA should at the very least ensure that any final Section 111(d) regulations are otherwise stayed until all judicial challenges to those regulations are concluded.

Respectfully,

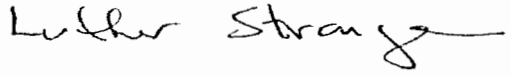


E. SCOTT PRUITT
Oklahoma Attorney General

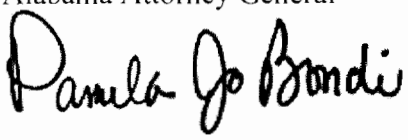


Patrick Morrisey
West Virginia Attorney General

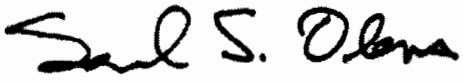
Jon Bruning
Nebraska Attorney General



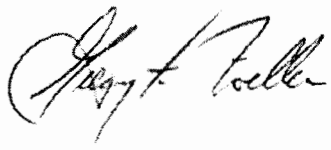
Luther Strange
Alabama Attorney General



Pam Bondi
Florida Attorney General



Sam Olens
Georgia Attorney General

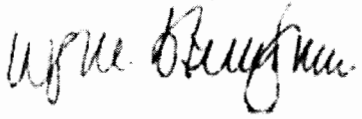


Greg Zoeller
Indiana Attorney General

Derek Schmidt
Kansas Attorney General

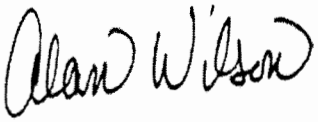
James D. "Buddy" Caldwell
Louisiana Attorney General

Tim Fox
Montana Attorney General



Wayne Stenehjem
North Dakota Attorney General

Mike DeWine
Ohio Attorney General



Alan Wilson
South Carolina Attorney General

Marty Jackley
South Dakota Attorney General

Sean Reyes
Utah Attorney General

Bill Schuette
Michigan Attorney General

Peter K. Michael
Wyoming Attorney General

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21
OKLAHOMA CITY, OK 73105

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

FIRST CLASS MAIL

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 2 1 2015

OFFICE OF
AIR AND RADIATION

The Honorable E. Scott Pruitt
Oklahoma Attorney General
313 N.E. 21st. Street
Oklahoma City, Oklahoma 73105

Dear Attorney General Pruitt:

Thank you for your letter to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the Clean Power Plan for existing power plants that was signed by the Administrator on June 2, 2014, and published in the *Federal Register* on June 18, 2014. The Administrator asked that I respond on her behalf.

Climate change induced by human activities is one of the greatest challenges of our time. It already threatens human health and welfare and our economic well-being, and if left unchecked, it will have devastating impacts on the United States and the planet. Power plants are the largest source of carbon dioxide emissions in the United States, accounting for roughly one-third of all domestic greenhouse gas emissions. The proposed Clean Power Plan builds on what states, cities and businesses around the country are already doing to reduce carbon pollution and establishes a flexible process for states to develop plans to reduce carbon dioxide that meet their needs. We have placed your comments in the docket for this rulemaking.

Again, thank you for your letter. I appreciate the opportunity to be of service and hope this response has been helpful.

Sincerely,

Janet G. McCabe
Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 21 2015

OFFICE OF
AIR AND RADIATION

The Honorable Patrick Morrisey
West Virginia Attorney General
1900 Kanawha Boulevard, East, Room 26
Charleston, West Virginia 25305

Dear Attorney General Morrisey:

Thank you for your letter to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the Clean Power Plan for existing power plants that was signed by the Administrator on June 2, 2014, and published in the *Federal Register* on June 18, 2014. The Administrator asked that I respond on her behalf.

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Sincerely,

Janet G. McCabe
Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 2 1 2015

OFFICE OF
AIR AND RADIATION

The Honorable Jon Bruning
Nebraska Attorney General
2115 State Capitol Building, P.O. Box 98920
Lincoln, Nebraska 68509-8920

Dear Attorney General Bruning:

Thank you for your letter to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the Clean Power Plan for existing power plants that was signed by the Administrator on June 2, 2014, and published in the *Federal Register* on June 18, 2014. The Administrator asked that I respond on her behalf.

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Sincerely,

Janet G. McCabe
Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 21 2015

OFFICE OF
AIR AND RADIATION

The Honorable Luther Strange
Alabama Attorney General
501 Washington Avenue
Montgomery, Alabama 36130

Dear Attorney General Strange:

Thank you for your letter to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the Clean Power Plan for existing power plants that was signed by the Administrator on June 2, 2014, and published in the *Federal Register* on June 18, 2014. The Administrator asked that I respond on her behalf.

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Sincerely,

Janet G. McCabe
Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 21 2015

OFFICE OF
AIR AND RADIATION

The Honorable Pamela Bondi
Florida Attorney General
The Capitol, PL 01
Tallahassee, Florida 32399

Dear Attorney General Bondi:

Thank you for your letter to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the Clean Power Plan for existing power plants that was signed by the Administrator on June 2, 2014, and published in the *Federal Register* on June 18, 2014. The Administrator asked that I respond on her behalf.

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Sincerely,

Janet G. McCabe
Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 21 2015

OFFICE OF
AIR AND RADIATION

The Honorable Samuel S. Olens
Georgia Attorney General
40 Capitol Square SW
Atlanta, Georgia 30334

Dear Attorney General Olens:

Thank you for your letter to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the Clean Power Plan for existing power plants that was signed by the Administrator on June 2, 2014, and published in the *Federal Register* on June 18, 2014. The Administrator asked that I respond on her behalf.

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Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 2 1 2015

OFFICE OF
AIR AND RADIATION

The Honorable Gregory F. Zoeller
Indiana Attorney General
302 West Washington Street, IGC-South
Indianapolis, Indiana 46204

Dear Attorney General Zoeller:

Thank you for your letter to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the Clean Power Plan for existing power plants that was signed by the Administrator on June 2, 2014, and published in the *Federal Register* on June 18, 2014. The Administrator asked that I respond on her behalf.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 2 1 2015

OFFICE OF
AIR AND RADIATION

The Honorable Derek Schmidt
Kansas Attorney General
120 South West 10th Street, 2nd Floor
Topeka, Kansas 66612-1597

Dear Attorney General Schmidt:

Thank you for your letter to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the Clean Power Plan for existing power plants that was signed by the Administrator on June 2, 2014, and published in the *Federal Register* on June 18, 2014. The Administrator asked that I respond on her behalf.

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Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 21 2015

OFFICE OF
AIR AND RADIATION

The Honorable James D. Caldwell
Louisiana Attorney General
P.O. Box 94095
Baton Rouge, Louisiana 70804

Dear Attorney General Caldwell:

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Janet G. McCabe
Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 21 2015

OFFICE OF
AIR AND RADIATION

The Honorable Tim Fox
Montana Attorney General
215 N. Sanders Street
Helena, Montana 59601

Dear Attorney General Fox:

Thank you for your letter to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the Clean Power Plan for existing power plants that was signed by the Administrator on June 2, 2014, and published in the *Federal Register* on June 18, 2014. The Administrator asked that I respond on her behalf.

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Janet G. McCabe
Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 2 1 2015

OFFICE OF
AIR AND RADIATION

The Honorable Wayne Stenehjem
North Dakota Attorney General
600 East Boulevard Avenue
Bismarck, North Dakota 58505-0040

Dear Attorney General Stenehjem:

Thank you for your letter to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the Clean Power Plan for existing power plants that was signed by the Administrator on June 2, 2014, and published in the *Federal Register* on June 18, 2014. The Administrator asked that I respond on her behalf.

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Janet G. McCabe
Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 21 2015

OFFICE OF
AIR AND RADIATION

The Honorable Mike DeWine
Ohio Attorney General
30 E. Broad Street, 14th Floor
Columbus, Ohio 43215

Dear Attorney General DeWine:

Thank you for your letter to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the Clean Power Plan for existing power plants that was signed by the Administrator on June 2, 2014, and published in the *Federal Register* on June 18, 2014. The Administrator asked that I respond on her behalf.

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Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 2 1 2015

OFFICE OF
AIR AND RADIATION

The Honorable Alan Wilson
South Carolina Attorney General
P.O. Box 11549
Columbia, South Carolina 29211-1549

Dear Attorney General Wilson:

Thank you for your letter to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the Clean Power Plan for existing power plants that was signed by the Administrator on June 2, 2014, and published in the *Federal Register* on June 18, 2014. The Administrator asked that I respond on her behalf.

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Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 21 2015

OFFICE OF
AIR AND RADIATION

The Honorable Marty J. Jackley
South Dakota Attorney General
1302 East Highway 14
Pierre, South Dakota 57501

Dear Attorney General Jackley:

Thank you for your letter to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the Clean Power Plan for existing power plants that was signed by the Administrator on June 2, 2014, and published in the *Federal Register* on June 18, 2014. The Administrator asked that I respond on her behalf.

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Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 2 1 2015

OFFICE OF
AIR AND RADIATION

The Honorable Bill Schuette
Michigan Attorney General
P.O. Box 30212
Lansing, Michigan 48909

Dear Attorney General Schuette:

Thank you for your letter to U.S. Environmental Protection Agency Administrator Gina McCarthy regarding the Clean Power Plan for existing power plants that was signed by the Administrator on June 2, 2014, and published in the *Federal Register* on June 18, 2014. The Administrator asked that I respond on her behalf.

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Janet G. McCabe
Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 2 1 2015

OFFICE OF
AIR AND RADIATION

The Honorable Peter K. Michael
Wyoming Attorney General
123 State Capitol
Cheyenne, Wyoming 82002

Dear Attorney General Michael:

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Acting Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 2 1 2015

OFFICE OF
AIR AND RADIATION

The Honorable Sean Reyes
Utah Attorney General
222 South Main Street, #500
Salt Lake City, Utah 84101

Dear Attorney General Reyes:

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Janet G. McCabe
Acting Assistant Administrator

State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

January 23, 2015

Via Certified Mail & Email

Mr. Larry F. Gottesman
National FOIA Officer
Environmental Protection Agency HQ
1200 Pennsylvania Avenue, NW
Mail Code: 2822T
Washington, D.C. 20460
Gottesman.larry@Epa.gov

Mr. William Niebling
Senior Advisor for Congressional
and International Affairs
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code: 6101A
Washington, D.C. 20460
Niebling.william@Epa.gov

Re: Request Number EPA-HQ-2015-002217

Dear Messrs. Gottesman and Niebling:

We write in response to two letters regarding the above Freedom of Information Act ("FOIA") request: (1) the letter of Mr. Gottesman, dated December 24, 2014, which addresses the denial of our fee waiver request ("Gottesman Letter"); and (2) the letter of Mr. Niebling, dated January 7, 2015, which seeks a clarified description of our request ("Niebling Letter"). These letters were in response to the resubmission of our original FOIA request, which we

modified following your first denial of our fee waiver request and request for clarification. Our fee waiver request was submitted in connection with our resubmitted FOIA request, dated December 5, 2014, seeking copies of records regarding EPA's 2011 Settlement Agreement, Docket Number EPA-HQ-OGC-2010-1057. *See* Exhibit A.

In the present letter, we resubmit *both* the fee waiver request *and* the December 5 request for information under the FIOA, while making the modifications described below. *See* Exhibit A. This resubmission follows several telephone conversations between our offices, in which we sought to resolve concerns regarding our requests without need for litigation or appeal.

This letter elaborates why EPA is required by law to grant a fee waiver, and modifies our FOIA request consistent with the above-referenced telephone conversations, including conversations with Mr. Kevin Auerbacher. We ask that you both grant the resubmitted waiver request and disclose all responsive documents to the resubmitted FOIA request, no later than 20 business days from the receipt of this letter, as required by FOIA. As before, we seek all responsive documents, but agree to a rolling production in order to facilitate our request.

The Gottesman Letter

The fee waiver request that we submitted on December 5, 2014, easily meets the standard for a FOIA fee waiver. "FOIA's fee waiver provision states that documents requested from a government agency 'shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.'" *Perkins v. U.S. Dep't of Veterans Affairs*, 754 F. Supp. 2d 1, 5 (D.D.C. 2010) (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). Where the requesters are public officials with no "commercial interest[s]," as here, a fee request must be given a liberal construction. *See id.*; *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1282, 1284 (9th Cir. 1987) (the public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters"). The *only* question here is whether release of the information requested will be "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); *accord* 40 C.F.R. § 2.107(l). The request satisfies all four factors on that question in EPA's FOIA rules:

Factor 1: The subject of the request.

The first factor is "whether the subject of the requested records concerns '*the operations or activities of the government.*'" 40 C.F.R. § 2.107(l)(2)(i) (emphasis added). The subject of the requested records is the 2011 Settlement Agreement, EPA-HQ-OGC-2010-1057, as more fully described in our request. *See* Exhibit A. EPA is a party to the 2011 Settlement Agreement, which imposes specific and identifiable obligations on EPA. *See id.* Therefore, the 2011 Settlement Agreement unmistakably "concern[s] identifiable operations or activities of the Federal government, with a connection that is direct and clear." 40 C.F.R. § 2.107(l)(2)(i).

Factor 2: The informative value of the information to be disclosed.

The second factor asks "[w]hether the disclosure is '*likely to contribute*' to an understanding of government operations or activities." *Id.* § 2.107(l)(2)(ii) (emphasis added). The disclosure of records sought in our request, which directly relate to the 2011 Settlement Agreement, are "likely to contribute" to an understanding of government operations or activities because the public is directly affected by EPA's specific obligations under the 2011 Settlement Agreement. *Id.* § 2.107(l)(2)(ii); *see* EPA-HQ-OGC-2010-1057; Exh. A. The 2011 Settlement Agreement committed EPA to propose standards of performance under Section 111 of the Clean Air Act, 42 U.S.C. § 7411, for new, modified, and existing power plants that include emission standards for carbon dioxide. *See* Docket Nos. EPA-HQ-OGC-2010-1057-0002; EPA-HQ-OGC-2010-1057-0036. To this point, EPA has adhered to this agreement, proposing standards of performance for new coal-fired power plants (79 Fed. Reg. 1430 (Jan. 8, 2014)), modified coal-fired power plants (79 Fed. Reg. 34,960 (June 18, 2014)), and existing coal-fired power plants (79 Fed. Reg. 34,830 (June 18, 2014)). The requested records will be "meaningfully informative" about EPA's "operations or activities" because they will "increase[] [the] public understanding" regarding how and why EPA arrived at the 2011 Settlement Agreement and how EPA views its obligations thereunder. 40 C.F.R. § 2.107(l)(2)(ii).

Factor 3: The contribution to an understanding of the subject by the public.

The third factor is "[w]hether disclosure of the requested information will contribute to '*public understanding*.'" 40 C.F.R. § 2.107(l)(2)(iii) (emphasis added). To satisfy this element, the requester must demonstrate his ability to disseminate the disclosed information to the public. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003).

Here, the disclosure will undoubtedly contribute to a "public understanding" of a "reasonably broad audience of persons interested in the subject" because all documents received pursuant to our request will be disseminated to the public through various, specific ways available to the West Virginia Attorney General. As the chief legal officer of the State of West Virginia who is directly elected by the People, the West Virginia Attorney General has the "ability and intention to effectively convey information to the public." *Id.* § 2.107(l)(2)(iii). *See* W. Va. Const. art. VII, § 1. The Attorney General will make all documents disclosed by EPA available to the general public, both in hard copy form at the main office of the Attorney General of West Virginia, and on the West Virginia Attorney General's website, free of charge. *See generally* http://www.ago.wv.gov/publicresources/epa/Pages/default.aspx. The Attorney General will also review the documents, describe them in an executive summary that highlights the most significant of the documents, and post that summary on the Attorney General's website. Depending on the content of the documents, the Attorney General may also publicize the disclosures through press releases to the entire media spectrum, media interviews with both newspaper and local television stations, and personal "town hall"-style discussions held throughout the State. In addition, again, depending upon the content of the documents, the

Attorney General may share the disclosed information with the Governor and the elected leaders of the state legislature for further dissemination through the public's elected representatives. These specific and identifiable means by which the Attorney General will publicize the disclosures are far more than "FOIA requires." *Rossotti*, 326 F.3d at 1314.

Factor 4: The significance of the contribution to public understanding.

The fourth factor is whether "the disclosure is likely to contribute '*significantly*' to public understanding of government operations or activities." 40 C.F.R. § 2.107(l)(2)(iv) (emphasis added). The contribution of the information requested, which relates to the implementation of the 2011 Settlement Agreement as more fully described in our request, is likely to "significantly" benefit the public understanding of EPA's "operations or activities." *Id.* To begin, because the 2011 Settlement Agreement is at least a significant factor that led to EPA's current proposed regulations of power plants under Section 111 of the Clean Air Act, public disclosure of information regarding this subject is critical to the public awareness of how and why EPA decided to regulate power plants in this way. The requested information is the only source for the public regarding the agency's decision to make a legally binding commitment to propose and finalize rules that will affect thousands of jobs in the coal mining and power generation sectors, and will directly influence the generation of electricity and the regulation of public utilities.

The Niebling Letter

We continue to believe that December 5 FOIA request reasonably describes the documents we are seeking, and would permit EPA officials to identify and locate those documents. Under FOIA, agencies like EPA are required to make "promptly available" records that are "reasonably describe[d]" in a request. 5 U.S.C. § 552(a)(3)(A); *see also* 40 C.F.R. § 2.102(c). The "reasonably describes" standard "'makes explicit the liberal standard for identification that Congress intended.'" *Nat'l Sec. Counselors v. C.I.A.*, 898 F. Supp. 2d 233, 274 (D.D.C. 2012) (quoting S. Rep. No. 93–854, at 10 (1974)). *See also Kowalczyk v. Dep't of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996) ("A request reasonably describes records if 'the agency is able to determine precisely what records are being requested.'" (quoting *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 326 (D.C. Cir. 1982)). Our December 5 request satisfies this "liberal standard" because our request includes specific information regarding the "date," "author[s]," "recipient[s]," and "subject matter" of the documents sought. *Id.*

However, in light of subsequent telephone conversations with Mr. Kevin Auerbacher, we believe that an alternatively phrased FOIA request would satisfy the public's right to the documents we seek, while also accommodating the practical concerns Mr. Niebling expressed in his January 7, 2015 letter. Accordingly, we withdraw our prior request. Instead, we now request that you provide a copy of any documents (including any and all written or electronic correspondence, electronic records, facsimiles, information about meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2010, to the

date of this letter between any persons representing one or more party to the 2011 Settlement Agreement—the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York, and Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund—and any of the following employees or former employees of EPA: Lisa Jackson, Gina McCarthy, Janet McCabe, Joseph Goffman, Elliott Zenick, Patricia Embrey, Scott Jordan, Avi Garbow, Lorie Schmidt, Howard Hoffman. We explicitly limit our request to documents relating to the 2011 Settlement Agreement, the Section 111(b) rulemaking(s), and the Section 111(d) rulemaking.

* * *

We thus resubmit our requested fee waiver and the description of the requested records, as modified above. *See* 5 U.S.C. § 552(a)(4)(A); *see also* 40 C.F.R. § 2.107(l), and (c). Because multiple parties are listed as co-requestors, Patrick Morrisey, the Attorney General of the State of West Virginia, confirms that he is the authorized representative for communications regarding this FOIA request. Thank you in advance for your prompt cooperation in this important matter.

Sincerely,

Patrick Morrisey
West Virginia Attorney General

Doug Peterson
Nebraska Attorney General

Derek Schmidt
Kansas Attorney General

E. Scott Pruitt
Oklahoma Attorney General

Jack Conway
Kentucky Attorney General

Alan Wilson
South Carolina Attorney General

James D. "Buddy" Caldwell
Louisiana Attorney General

Peter K. Michael
Wyoming Attorney General

cc:

The Honorable Gina McCarthy
National Freedom of Information Office
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
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hq.foia@epa.gov

State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

December 5, 2014

Via Certified Mail & Email

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National FOIA Officer
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Mr. William Niebling
Senior Advisor for Congressional
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Niebling.william@Epa.gov

Re: Request Number EPA-HQ-2015-000890

Dear Messrs. Gottesman and Niebling:

We write in response to two letters regarding the above Freedom of Information Act ("FOIA") request: (1) the letter of Mr. Gottesman, dated November 5, 2014, which addresses the denial of our fee waiver request ("Gottesman Letter"); and (2) the letter of Mr. Niebling, dated December 3, 2014, which seeks a clarified description of our request ("Niebling Letter"). Our fee waiver request was submitted in connection with our FOIA request, dated October 17, 2014,

seeking copies of records regarding EPA's 2011 Settlement Agreement, Docket Number EPA-HQ-OGC-2010-1057. *See* Exhibit A.

In the present letter, we resubmit *both* the fee waiver request *and* the October 17 request for information under the FIOA (with three minor modifications noted below). *See* Exhibit A. This letter further elaborates why EPA is required by law to grant a fee waiver, and also explains why our request is sufficiently clear. Accordingly, we ask that you both grant the resubmitted waiver request and disclose all responsive documents to the resubmitted FOIA request, no later than 20 business days from the receipt of this letter, as required by FOIA. We seek all responsive documents, but would agree to a rolling production in order to facilitate our request.

The Gottesman Letter

The fee waiver request that we submitted on October 17, 2014, easily meets the standard for a FOIA fee waiver. "FOIA's fee waiver provision states that documents requested from a government agency 'shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.'" *Perkins v. U.S. Dep't of Veterans Affairs*, 754 F. Supp. 2d 1, 5 (D.D.C. 2010) (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). Where the requesters are public officials with no "commercial interest[s]," as here, a fee request must be given a liberal construction. *See id.*; *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1282, 1284 (9th Cir. 1987) (the public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters"). The *only* question here is whether release of the information requested will be "likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); *accord* 40 C.F.R. § 2.107(l). The request satisfies all four factors on that question in EPA's FOIA rules:

Factor 1: The subject of the request.

The first factor is "whether the subject of the requested records concerns '*the operations or activities of the government.*'" 40 C.F.R. § 2.107(l)(2)(i) (emphasis added). The subject of the requested records is the 2011 Settlement Agreement, EPA-HQ-OGC-2010-1057, as more fully described in our request. *See* Exhibit A. EPA is a party to the 2011 Settlement Agreement, which imposes specific and identifiable obligations on EPA. *See id.* Therefore, the 2011 Settlement Agreement unmistakably "concern[s] identifiable operations or activities of the Federal government, with a connection that is direct and clear." 40 C.F.R. § 2.107(l)(2)(i).

Factor 2: The informative value of the information to be disclosed.

The second factor asks "[w]hether the disclosure is '*likely to contribute*' to an understanding of government operations or activities." *Id.* § 2.107(l)(2)(ii) (emphasis added). The disclosure of records sought in our request, which directly relate to the 2011 Settlement

Agreement, are "likely to contribute" to an understanding of government operations or activities because the public is directly affected by EPA's specific obligations under the 2011 Settlement Agreement. *Id.* § 2.107(l)(2)(ii); *see* EPA-HQ-OGC-2010-1057; Exh. A. The 2011 Settlement Agreement committed EPA to propose standards of performance under Section 111 of the Clean Air Act, 42 U.S.C. § 7411, for new, modified, and existing power plants that include emission standards for carbon dioxide. *See* Docket Nos. EPA-HQ-OGC-2010-1057-0002; EPA-HQ-OGC-2010-1057-0036. To this point, EPA has adhered to this agreement, proposing standards of performance for new coal-fired power plants (79 Fed. Reg. 1430 (Jan. 8, 2014)), modified coal-fired power plants (79 Fed. Reg. 34,960 (June 18, 2014)), and existing coal-fired power plants (79 Fed. Reg. 34,830 (June 18, 2014)). The requested records will be "meaningfully informative" about EPA's "operations or activities" because they will "increase[] [the] public understanding" regarding how and why EPA arrived at the 2011 Settlement Agreement and how EPA views its obligations thereunder. 40 C.F.R. § 2.107(l)(2)(ii).

Factor 3: The contribution to an understanding of the subject by the public.

The third factor is "[w]hether disclosure of the requested information will contribute to '*public understanding.*'" 40 C.F.R. § 2.107(l)(2)(iii) (emphasis added). Here, the disclosure will undoubtedly contribute to a "public understanding" of a "reasonably broad audience of persons interested in the subject" because all documents received pursuant to our request will be made public. *Id* West Virginia will make all documents disclosed by EPA available to the general public, both in hard copy form at the main office of the Attorney General of West Virginia, and on the West Virginia Attorney General's website, free of charge. *See generally* http://www.ago.wv.gov/publicresources/epa/Pages/default.aspx. As the chief legal officer of the State of West Virginia who is directly elected by the People, the West Virginia Attorney General has the "ability and intention to effectively convey information to the public." *Id.* § 2.107(l)(2)(iii). *See* W. Va. Const. art. VII, § 1.

Factor 4: The significance of the contribution to public understanding.

The fourth factor is whether "the disclosure is likely to contribute '*significantly*' to public understanding of government operations or activities." 40 C.F.R. § 2.107(l)(2)(iv) (emphasis added). The contribution of the information requested, which relates to the implementation of the 2011 Settlement Agreement as more fully described in our request, is likely to "significantly" benefit the public understanding of EPA's "operations or activities." *Id.* To begin, because the 2011 Settlement Agreement is at least a significant factor that led to EPA's current proposed regulations of power plants under Section 111 of the Clean Air Act, public disclosure of information regarding this subject is critical to the public awareness of how and why EPA decided to reguate power plants in this way. The requested information is the only source for the public regarling the agency's decision to make a legally binding commitment to propose and finalize rules that will affect thousands of jobs in the coal mining and power generation sectors, and will directly influence the generation of electricity and the regulation of public utilities.

The Niebling Letter

Our October 17 FOIA request reasonably describes the documents we are seeking, which will permit EPA officials to identify and locate those documents. Under the FOIA, agencies like EPA are required to make "promptly available" records that are "reasonably describe[d]" in a request. 5 U.S.C. § 552(a)(3)(A); *see also* 40 C.F.R. § 2.102(c). The "reasonably describes" standard "'makes explicit the liberal standard for identification that Congress intended.'" *Nat'l Sec Counselors v. C.I.A.*, 898 F. Supp. 2d 233, 274 (D.D.C. 2012) (quoting S. Rep. No. 93–854, at 10 (1974)). *See also Kowalczyk v Dep't of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996) ("A request reasonably describes records if 'the agency is able to determine precisely what records are being requested.'" (quoting *Yeager v. Drug Enforcement Admin.*, 678 F.2d 315, 326 (D.C. Cir. 1982)). FOIA requests made to EPA should, "*[w]henever possible*, . . . include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter." 40 C.F.R. § 2.102(c) (emphasis added).

Our October 17 request easily satisfies this "liberal standard" because, at a minimum, our request includes specific information regarding the "date," "author[s]," "recipient[s]," and "subject matter" of the documents sought. *Id.* As our request explains, we are merely seeking communications between EPA officials and *specific* organizations and *specific* States regarding a *specific* settlement agreement, as well as other documents regarding that specific settlement. *See* Exhibit A at 2. The request identifies each of these organizations and States by name. *Id.* Moreover, the requested documents are further narrowed by a list of terms that will help ensure those documents relate to the specific settlement agreement referenced therein. *Id.* at 2-3. And the description of the forms of the documents being sought is merely a standard description of the forms that agency documents regarding this issue may take.

The Niebling Letter vaguely asserts that these specific identifying facts are insufficient to permit EPA officials to identify these records, The letter fails to explain, however, "what additional information [the requesters] need to provide" to satisfy the requirement, given that all of the parties to the settlement are specifically identified. 40 C.F.R. § 2.102(c). For example, it is entirely beyond the reasonable knowledge of any requester what personnel EPA assigned to communicate with parties to the settlement.

The Niebling Letter also appears to suggest that the "potentially . . . voluminous documents" subject to the request may be grounds for denying the request under 5 U.S.C. § 552(a)(3)(A). However, the number of records requested is irrelevant for purposes of the "reasonably describes" standard. *Tereshchuk v. Bureau of Prisons*, -- F. Supp. 3d --, 2014 WL 4637028, at *7 (D.D.C. Sept. 16, 2014) (citing *Yeager*, 678 F.2d at 326; FOIA Update Vol. IV, No. 3, at 5 ("The sheer size or burdensomeness of a FOIA request, in and of itself, does not entitle an agency to deny that request on the ground that it does not 'reasonably describe' records within the meaning of 5 U.S.C. § 552(a)(3)(A)")).

Finally, the Niebling Letter takes issue with the use of the phrases "otherwise associated with" and "in any way" in our October 17 request, as well as the search term "literal." While we continue believe that those phrases and terms would assist the agency in identifying documents discussing the specific settlement agreement at issue, we hereby modify our request to delete those phrases and search term. As modified, the request is now:

We request that you provide a copy of any of the following documents (including any and all written or electronic correspondence, electronic records, facsimiles, information about meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2010, to the date of this letter between EPA officials and any persons representing one or more party to the 2011 Settlement Agreement—the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York, and Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund—that contain any of the following words:

- "settlement"
- "111"
- "111(b)"
- "111(d)"
- "7411"
- "7411(b)"
- "7411(d)"
- "42 U.S.C § 7411"
- "42 U.S.C § 7411(b)"
- "42 U.S.C § 7411(d)"
- "power plants"
- "EGUs"
- "coal"
- "coal-fired"
- "carbon dioxide"
- "CO_2"
- "greenhouse"
- "GHG"
- "AEP v. Connecticut"
- "AEP"
- "New Jersey v. EPA"

We further request that you provide a copy of any of documents (including any and all written or electronic correspondence, electronic records, facsimiles, information about meetings

and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2010, to the date of this letter, which references the 2011 Settlement Agreement, without regard to the recipient or author of the document.

* * *

We reiterate both our requested fee waiver and the description of the requested records, as modified above. *See* 5 U.S.C. § 552(a)(4)(A); *see also* 40 C.F.R. § 2.107(l), and (c). As requested in the Niebling Letter, because multiple parties are listed as co-requestors, Patrick Morrisey, the Attorney General of the State of West Virginia, confirms that he is the authorized representative for communications regarding this FOIA request. Thank you in advance for your prompt cooperation in this important matter.

Sincerely,

Patrick Morrisey
West Virginia Attorney General

Jon Bruning
Nebraska Attorney General

Derek Schmidt
Kansas Attorney General

E. Scott Pruitt
Oklahoma Attorney General

Jack Conway
Kentucky Attorney General

Alan Wilson
South Carolina Attorney General

James D. "Buddy" Caldwell
Louisiana Attorney General

Peter K. Michael
Wyoming Attorney General

cc:

The Honorable Gina McCarthy
National Freedom of Information Office
Environmental Protection Agency
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hq.foia@epa.gov

EXHIBIT A

State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

October 17, 2014

Via Certified Mail & Email

The Honorable Gina McCarthy
National Freedom of Information Office
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460
hq.foia@epa.gov

Re: Freedom of Information Act Request From The States Of West Virginia, Kansas, Louisiana, Nebraska, Oklahoma, South Carolina, and Wyoming, and the Commonwealth of Kentucky, Concerning EPA's 2011 Settlement Agreement, Docket No. EPA-HQ-OGC-2010-1057

Dear Administrator McCarthy:

This letter is a request under the Freedom of Information Act, 5 U.S.C. § 552(a) *et seq.* (the "Act"), for information concerning communications relating to the implementation of a 2011 settlement agreement (the "2011 Settlement Agreement") between the Environmental Protection Agency ("EPA") and the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York, and Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund. *See* Dkt. No. EPA-HQ-OGC-2010-1057. The rules that EPA has proposed pursuant to the 2011 Settlement Agreement threaten to cause severe harm to the citizens of our States, forcing coal miners to lose their jobs and leading energy prices to skyrocket.

In the 2011 Settlement Agreement, EPA committed to proposing standards of performance under Section 111 of the Clean Air Act, 42 U.S.C. § 7411, for new, modified, and existing power plants that include emission standards for carbon dioxide. *See* Dkt. Nos. EPA-HQ-OGC-2010-1057-0002; EPA-HQ-OGC-2010-1057-0036. EPA has heretofore abided by this settlement, proposing standards of performance for new coal-fired power plants (79 Fed. Reg.

1430 (Jan. 8, 2014)) modified coal-fired power plants (79 Fed. Reg 34,960 (June 18, 2014)), and existing coal-fired power plants (79 Fed. Reg. 34,830 (June 18, 2014)). These proposed rules are rife with numerous legal defects. *See, e g*, Formal Comment Letter on Proposed Performance Standards for New Power Plants from the State of West Virginia et al. to Gina McCarthy, Adm'r, EPA (May 9, 2014), Letter on EPA's Section 111(d) Authority from Patrick Morrisey, Att'y Gen. of W. Va., to Gina McCarthy, Adm'r, EPA (June 6, 2014); Brief for the State of West Virginia et al. as Amicus Curiae Supporting Petitioner, *In re: Murray Energy Corporation*, No. 14-1112, 2014 WL 2885937 (D.C. Cir. June 25, 2014); Petition for Review, *State of West Virginia et al. v EPA*, No. 14-1146 (D.C. Cir. Aug. 1, 2014).

We request that you provide a copy of any of the following documents (including any and all written or electronic correspondence, electronic records, facsimiles, information about meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2010, to the date of this letter between EPA officials and any persons representing, or otherwise associated with, one or more party to the 2011 Settlement Agreement—the States of New York, California, Connecticut, Delaware, Maine, New Mexico, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York, and Natural Resources Defense Council, Sierra Club, and Environmental Defense Fund—that contain any of the following words:

- "settlement"
- "111"
- "111(b)"
- "111(d)"
- "7411"
- "7411(b)"
- "7411(d)"
- "42 U.S.C § 7411"
- "42 U.S.C § 7411(b)"
- "42 U S.C § 7411(d)"
- "power plants"
- "EGUs"
- "coal"
- "coal-fired"
- "carbon dioxide"
- "CO_2"
- "greenhouse"
- "GHG"
- "AEP v Connecticut"
- "AEP"

- "New Jersey v. EPA"
- "literal"

We further request that you provide a copy of any of documents (including any and all written or electronic correspondence, electronic records, facsimiles, information about meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions) from January 1, 2010, to the date of this letter, which references the 2011 Settlement Agreement in any way, without regard to the recipient or author of the document.

We also request that you waive any applicable fees. As you know, a fee waiver is appropriate when disclosure is in the public interest and not in a commercial interest. *See* 45 C.F.R. § 5.45(a) *et seq.* This request for information about an important aspect of your agency's implementation of the 2011 Settlement Agreement unquestionably satisfies these requirements. Disclosure of the requested documents is directly in the public interest. The actions that EPA has taken pursuant to the commitments made in the 2011 Settlement Agreement will affect thousands of West Virginians, either through jobs in the coal mining or power generation sector or by way of higher electricity rates. A fee waiver is thus clearly appropriate, and we reserve our right to appeal a denial of such waiver.

In light of the importance of this inquiry to the public, we respectfully request that you disclose all responsive documents as soon as possible, but no later than 20 business days from receipt of this letter, as required under the Act. Should you assert that any of the material is exempt from disclosure, please redact the allegedly exempt sections and provide the remaining material. In each instance, please describe the redacted material in detail and specify the statutory bases for refusing to disclose the material. We reserve the right to appeal the withholding or deletion of any information.

Thank you in advance for your prompt cooperation in this important matter.

Sincerely,

Patrick Morrisey
West Virginia Attorney General

Jon Bruning
Nebraska Attorney General

Derek Schmidt
Kansas Attorney General

E. Scott Pruitt
Oklahoma Attorney General

Jack Conway
Kentucky Attorney General

Alan Wilson
South Carolina Attorney General

James D. "Buddy" Caldwell
Louisiana Attorney General

Peter K. Michael
Wyoming Attorney General

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The Honorable Gina McCarthy
National Freedom of Information Office
Environmental Protection Agency
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STATE OF LOUISIANA
OFFICE OF ATTORNEY GENERAL

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

STATE OF NEBRASKA
OFFICE OF ATTORNEY GENERAL

DOUG PETERSON
ATTORNEY GENERAL

STATE OF WEST VIRGINIA
OFFICE OF ATTORNEY GENERAL

PATRICK MORRISEY
ATTORNEY GENERAL

March 25, 2015

The Honorable Regina A. McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460

Via Certified Mail No. 7010 0290 0000 5952 0310

Also Submitted to Docket ID No. EPA–HQ–OAR–2013–0495 via email to a-and-r-docket@epa.gov

Re: Proposed *Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 1430 (Jan. 8, 2014) (Docket No. EPA-HQ-OAR-2013-0495)

Dear Administrator McCarthy:

The Environmental Protection Agency ("EPA") recently announced its *intention* to issue the final rule for *Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units* (the "Proposed Rule"),[1] in summer 2015, establishing new source performance standards ("NSPS") for greenhouse gas emissions for new fossil fuel-fired electric generating units ("EGUs").[2] On May 9, 2014, Louisiana, West Virginia, and Nebraska, along with 13 other States submitted extensive comments on the Proposed Rule, explaining that the Proposed Rule is unlawful. Several of the States also noted EPA's failure to comply with notice and comment requirements by neglecting to docket the Notice of Data Availability and accompanying Technical Support Document until February 6, 2014.[3]

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[1] 79 Fed. Reg. 1430 (Jan. 8, 2014).

[2] *See* EPA FACT SHEET: Clean Power Plan and Carbon Pollution Standards, http://www2.epa.gov/sites/production/files/2015-01/documents/20150107fs-key-dates.pdf (Site last visited 2/20/15).

[3] *See* Comments of West Virginia, Nebraska, Alabama, Alaska, Arizona, Georgia, Kansas, Kentucky, Louisiana, Michigan, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, and Utah on the Proposed *Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units*

Now, more than a year after publication of the Proposed Rule, EPA's proposal suffers from an additional infirmity further plaguing its rulemaking process. Section 111(b)(1)(B) of the Clean Air Act ("CAA") requires EPA to promulgate final NSPS standards no later than one year following publication of the proposed rule. *See* 42 U.S.C. § 7411(b)(1)(B) (EPA "shall publish proposed regulations, establishing Federal standards of performance for new source . . . [EPA] *shall* promulgate, within one year after such publication, such standards with such modifications as he deems appropriate.") (emphasis added). Here, the Proposed Rule was published on January 8, 2014; therefore, by failing to promulgate the final rule by January 8, 2015, EPA has violated the mandatory duty established by Section 111(b)(1)(B) of the CAA. Considering all of the grounds upon which this rule is likely to be overturned,[4] and because the rulemaking threatens the citizens of the States, we as the chief legal officers of the States are notifying your agency that this Proposed Rule has expired. It must therefore be withdrawn.

Congress' mandate that EPA promulgate final NSPS rules within one year of publication of the proposed standards was an intentional requirement that recognizes the unusually immediate impact of the rules on finalization. Once an NSPS emissions standard is final, it applies to sources that commenced construction after the date of the proposal in the Federal Register, as opposed to taking effect after the date of the final rule's publication.[5] Indeed, the Proposed Rule acknowledges this, stating: "once an NSPS is finalized, then the standard applies to any new source or modification that meets the applicability of the NSPS and has not commenced construction as of the date of the proposed NSPS."[6] By subjecting new sources to the rule at the time of proposal, Section 111(a)(2) creates a unique impact of causing harm to EGUs immediately upon publication of the Proposed Rule.

The one year deadline imposed by the CAA also limits the period during which businesses contemplating construction are left in a state of uncertainty with respect to the final NSPS emission standards. Section 111(b)(1)(B) allows EPA to, in the final rule, make modifications to the proposed standards of performance the Administrator "deems appropriate" after considering the public comments. Because of this uncertainty, once EPA announced its intention (through publication of the Proposed Rule) to create new emissions standards for fossil fuel-fired EGUs and natural gas-fired stationary combustion turbines, some sources may have made the business decision to postpone construction until the final NSPS are issued. Congress specifically limited the time frame during which this uncertainty would be allowed by setting a precise one-year deadline within which EPA *must* act. But rather than comply with the law, EPA has let that one year deadline come and go. Assuming EPA does, in fact, promulgate the final rule this summer, EPA will have missed the mandatory deadline by anywhere from six to eight months, thereby subjecting sources or proposed sources to at least 1.5 times the delay permitted

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(Docket No. EPA-HQ-OAR-2013-0495) (May 9, 2014). *See also* Comment letters submitted individually by some States.

[4] *See id.*

[5] 42 U.S.C. § 7411(1)(a) (defining "new source" as "any stationary source, the construction or modification of which is commenced after the publication of regulations (*or, if earlier, proposed regulations*) prescribing a standard of performance under this section which will be applicable to such source.") (emphasis added).

[6] 79 Fed. Reg. at 1489.

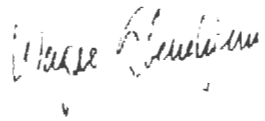
under the statute. As the United States Supreme Court noted in *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994), "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."

Furthermore, because the proposed Section 111(d) rule is *predicated on the publication of a lawful final Section 111(b) rule*, EPA's failure to finalize the Section 111(b) rule within the statutorily required timeframe has imposed substantial harms upon many States. Specifically, States are currently expending considerable time and resources developing implementation plans required by the proposed Section 111(d) rule. But if EPA had finalized the Section 111(b) rule in January, in anything close to its proposed form, that rule would likely be subject to invalidation in court, for the reasons described in the States' May 9 letter. Such court invalidation would in turn have further rendered unlawful the entire Section 111(d) rulemaking, permitting the States to stop the ongoing waste of public resources in preparing Section 111(d) implementation plans. EPA's unlawful delay in finalizing the Section 111(b) rule is thus additionally the cause of substantial harm to States in particular.

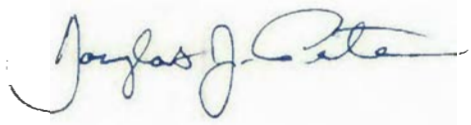
Given the unlawful nature of the Section 111(b) rule, for the reasons outlined in the States' previous May 9, 2014, comments and now due to EPA's failure to timely issue the final rule, these efforts are pointless. EPA's failure to promulgate final new source performance standards by January 8, 2014, requires the withdrawal of the Proposed Rule. The withdrawal of the Proposed Rule would also require withdrawal of the proposed Section 111(d) rule.

Sincerely.

James D. "Buddy" Caldwell
Louisiana Attorney General



Wayne Stenehjem
North Dakota Attorney General



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JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

The Honorable Regina A. McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

State of Oklahoma, ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma; Oklahoma Department of Environmental Quality

(b) County of Residence of First Listed Plaintiff Tulsa
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
E. Scott Pruitt, OBA #15828, Attorney General of Oklahoma; Patrick R. Wyrick, OBA #21874, Solicitor General of Oklahoma; 313 NE 21st St., Oklahoma City, OK 73105, 405-521-4396

DEFENDANTS

Gina McCarthy, in her official capacity as Administrator of the U.S. Environmental Protection Agency; U.S. Environmental Protection Agency

County of Residence of First Listed Defendant Oklahoma
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☒ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:

Brief description of cause:
Action for declaratory judgment and injunctive relief against ultra vires actions of governmental officer and agency

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE
06/30/2015

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the six boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Oklahoma

State of Oklahoma ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma

Plaintiff

v.

Gina McCarthy, in her official capacity as Administrator, U.S. Environmental Protection Agency

Defendant

Civil Action No. 15-cv-369-CVE-FHM

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* United States Environmental Protection Agency, 1200 Penn. Ave. NW, Mail Code 1105A, Washington, DC 20004; 202-564-7317

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: E. Scott Pruitt, OBA #151828, Attorney General of Oklahoma, 313 NE 21st St., Oklahoma City, OK 73105; 405-521-4396; Service email: fc.docket@oag.state.ok.us; Scotts.Pruitt@oag.ok.gov

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: JUL 02 2015

CLERK OF COURT Phil Lombardi

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma, and OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY,	)	
Plaintiffs,	)	
v.	)	**Case No. 15-CV-0369-CVE-FHM**
GINA MCCARTHY, in her official capacity as Administrator of the U.S. Environmental Protection Agency, and U.S. ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendants.	)	

ORDER

On July 1, 2015, the State of Oklahoma and the Oklahoma Department of Environmental Quality filed this case challenging the United States Environmental Protection Agency's (EPA) proposed "Power Plan" to reduce carbon-dioxide emissions on a nationwide basis. However, plaintiffs represent that the Power Plan is not a final rule, and at this point the Power Plan is simply a proposal that may require the reduction of carbon-dioxide emissions if it is eventually adopted as a final rule. See Dkt. # 2, at 6-9. Plaintiffs are correct that the Power Plan is a proposed rule that is undergoing the rulemaking process. Carbon Pollution Emission Guidelines for Existing Stationery Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830-01 (proposed June 18, 2014). Numerous states, including Oklahoma, recently filed a case in the United States Court of Appeals for the District of Columbia Circuit seeking to enjoin the EPA from proceeding with the Power Plan, but the case was dismissed for lack of jurisdiction because that court lacked jurisdiction

over the case. In re Murray Energy Corp., ___ F.3d ___, 2015 WL 3555931 (D.C. Cir. June 9, 2015). The decision was based on the clearly-established jurisdictional principle that a proposed rule by a governmental agency is not a final agency action subject to judicial review. Id. at *2. In addition, the Clean Air Act contains a judicial review provision that vests exclusive jurisdiction over challenges to a national primary or secondary ambient air quality standard in the D.C. Circuit. 42 U.S.C. § 7607(b). Challenges to a locally or regionally applicable plan must be filed directly in the appropriate federal circuit of appeals for that region. Id.

Plaintiffs' complaint acknowledges the D.C. Circuit's decision in Murray and the judicial review provision of the Clean Air Act, but the complaint fails to clearly set forth how this Court has the authority to exercise jurisdiction over this case given these jurisdictional limitations. The Court finds that the issue of subject matter jurisdiction should be resolved at the outset of the case. Until this Court determines that it has jurisdiction over this case, it would be premature to entertain plaintiffs' motion for a permanent injunction and related motions, and the Court finds that those motions (Dkt. ## 5, 7,8) are moot. If the Court determines that it has subject matter jurisdiction over this case, plaintiffs may reurge their motion for a preliminary injunction.

IT IS THEREFORE ORDERED that, no later than **July 16, 2015**, plaintiffs are directed to file a brief not to exceed 25 pages on the issues of whether this Court has jurisdiction to hear a challenge to a proposed rule by the EPA and whether the judicial review provision of the Clean Air Act precludes this Court from exercising jurisdiction over plaintiffs' claims. Defendants' response is due no later than **August 6, 2015**, and plaintiffs' reply is due no later than **August 20, 2015**.

IT IS FURTHER ORDERED that plaintiffs are directed to serve a copy of this Order on defendants no later than **July 9, 2015,** and plaintiffs shall promptly file notice that such service has

been made. Plaintiffs' failure to comply with this requirement will result in a delay of the Court's ruling on the issue of subject matter jurisdiction.

IT IS FURTHER ORDERED that Plaintiffs' Motion for a Preliminary Injunction (Dkt. # 5), Plaintiffs' Motion to Expedite Briefing on Their Motion for a Preliminary Injunction (Dkt. # 7), and Plaintiffs' Motion for Leave to File Oversized Brief (Dkt. # 8) are **moot**.

DATED this 2nd day of July, 2015.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) STATE OF OKLAHOMA ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma,

and

(2) OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiffs,

v.

(1) GINA MCCARTHY, in her official capacity as Administrator of the U.S. Environmental Protection Agency,

and

(2) U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Case No. 15-CV-369-CVE-FHM

COMPLAINT

1. This is an action for declaratory judgment and injunctive relief against the *ultra vires* actions of a government officer and agency that are currently inflicting substantial irreparable injury on the State of Oklahoma. Not only do Defendants United States Environmental Protection Agency and Administrator Gina McCarthy claim authority to compel state governments to reorganize their energy economies—in contravention of at least three separate statutory bars and two constitutional

limitations on federal power—but they are already acting to exercise that bogus authority. By "proposing" that states will be required to fundamentally restructure the generation, transmission, and regulation of electricity, and do so at a breakneck pace, Defendants have left states no choice but to begin carrying out EPA's commands at this time, well before any court has an opportunity to review their "final" rule. The entire point of this unprecedented approach is to evade judicial review by forcing states to take burdensome and expensive actions that will be difficult or impossible to reverse even when Defendants' assertion of authority is ultimately rejected—as it inevitably will be. Unless this Court intervenes, Oklahoma will have no meaningful or adequate remedy to enforce the limitations that the Clean Air Act and the Constitution place on the authority of the United States Environmental Protection Agency and its Administrator and to avoid injury to its sovereign, quasi-sovereign, fiscal, and economic interests.

PARTIES

2. The State of Oklahoma is a State of the United States of America with all rights, powers, and immunities of a State, including the sovereign power over individuals and entities within its jurisdiction and the power to create and enforce legal codes, statutes, and constitutional provisions, and to act pursuant to its police powers. The State of Oklahoma has exercised these powers to create a comprehensive energy regulatory scheme that is administered across several governmental components. By exercising its regulatory authority, the State of Oklahoma has acted to secure for itself and its citizens affordable and reliable generation and transmission of electricity. Coal-fired generation contributes 38 percent of electricity generation in the State.

3. Scott Pruitt, in his official capacity as Attorney General, brings this action on behalf of the State of Oklahoma as chief law officer for the State of Oklahoma. In that capacity, he has a statutory duty to prosecute and defend all

actions and proceedings in any federal court in which the State, including any of its components, is interested as a party. *See* 74 O.S. § 18b(A)(2).

4. The Oklahoma Department of Environmental Quality ("ODEQ") is the State of Oklahoma's primary environmental regulator, responsible for formulating and enforcing air and water quality standards, among other laws, within the State.

5. The State of Oklahoma has an interest in contesting the *ultra vires* actions taken by Defendant McCarthy purportedly under her office as Administrator of the U.S. Environmental Protection Agency because these actions harm the State of Oklahoma's interests by, *inter alia*, requiring the restructuring of the State's energy sector, impairing the functioning of the statutory and regulatory system that ensures Oklahoma's citizens have access to a reliable electric system, undermining the State of Oklahoma's exercise of its police powers in reliance on reliable electric power, compelling the state to expend substantial administrative and bureaucratic resources, compromising investment and tax revenue, and threatening the health and welfare of Oklahoma's citizens by undermining electric reliability and affordability.

6. Defendant Gina McCarthy is Administrator of the U.S. Environmental Protection Agency ("EPA") and is responsible for administering the Clean Air Act ("CAA" or the "Act"). All actions challenged in this case were taken pursuant to McCarthy's direct or indirect orders and under the color of her office.

7. Defendant U.S. Environmental Protection Agency is a federal regulatory agency administered by Defendant McCarthy. "EPA" refers to both the U.S. Environmental Protection Agency and Administrator McCarthy in her official capacity.

JURISDICTION AND VENUE

8. This Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 because Defendants' actions undertaken in asserted reliance on federal law exceed their delegated authority, contravene specific statutory and constitutional

prohibitions, involve enormous waste of governmental resources, purport to require the complete restructuring of the energy industry within the State of Oklahoma, and are currently inflicting substantial irreparable injuries on the State of Oklahoma, for which the State has no other adequate prospect of relief. *See generally Leedom v. Kyne*, 358 U.S. 184 (1958); *Central Hudson Gas & Electric Corp. v. EPA*, 587 F.2d 549 (2d Cir. 1978).

9. The State of Oklahoma and other parties attempted to obtain relief from the EPA Power Plan by filing All Writs Act petitions in the D.C. Circuit pursuant to that Court's decision in *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984). The D.C. Circuit dismissed those petitions, holding that the EPA Power Plan was not "final action" pursuant to Clean Air Act Section 307(b), 42 U.S.C. § 7607(b), and that it therefore lacked jurisdiction to consider them. *In re Murray Energy Corp.*, __ F.3d __, Nos. 14-1112, 14-1151, 14-1146, 2015 WL 3555931 (D.C. Cir. June 9, 2015). That decision denying statutory jurisdiction under the Clean Air Act supports this Court's exercise of residual Section 1331 jurisdiction pursuant to *Leedom*. See 358 U.S. at 190–91.

10. CAA § 307, 42 U.S.C. § 7607, does not displace or limit the Court's jurisdiction under 28 U.S.C. § 1331.

11. Venue is proper under 28 U.S.C. § 1391(e)(1).

BACKGROUND

A. CAA Section 111(d)

12. The Clean Air Act is founded on the principle of cooperative federalism, with states retaining the primary authority to regulate emissions from sources in their territories. The Act specifically recognizes that "air pollution control at its source is the primary responsibility of States and local governments." CAA § 101(a)(3), 42 U.S.C. § 7401(a)(3).

13. CAA § 111(d), 42 U.S.C. § 7411(d), concerns the application of standards of performance to certain existing sources within categories of sources of air pollution that are also subject to new source performance standards under CAA § 111(b).

14. A "standard of performance" is defined as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated." CAA § 111(a)(1), 42 U.S.C. § 7411(a)(1).

15. In Section 111(d), Congress charged states with establishing standards of performance for certain minor categories of sources for which new source performance standards had already been promulgated, but which are not subject to regulation under Section 112 of the Act and which emit pollutants that are not listed under Section 108 of the Act. Congress expressly authorized states, when establishing these standards and applying them to particular sources, to "take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies."

16. EPA's role under Section 111(d) is limited to creating regulations to establish a "procedure" under which states submit their Section 111(d) implementation plans, disapproving plan submissions that are unsatisfactory, and promulgating federal plans for states that do not submit satisfactory plans.

17. Section 111(d) is subject to a statutory limitation on EPA's authority to call for states to submit Section 111(d) plans. In relevant limitation, that part provides that EPA may not mandate that states establish standards for performance for existing sources that are part of "a source category which is regulated under section [112 of the CAA]."

B. EPA's Regulation of Coal-Fired Power Plants Under Section 112

18. Section 112 of the Act, 42 U.S.C. § 7412, establishes a program regulating emissions of certain "hazardous air pollutants" from certain categories of sources that are included in the Section 112(c) list of source categories.

19. Although Section 112 permits EPA to list categories of major and area sources of listed hazardous air pollutants, it specifically precludes regulation of "electric utility steam generating units" (i.e., fossil-fuel-fired power plants) unless and until "the Administrator finds such regulation is appropriate and necessary." CAA § 112(n)(1)(A), 42 U.S.C. § 7412(n)(1)(A).

20. On December 20, 2000, EPA published a notice of its finding that regulation of electric utility steam generating units was appropriate and necessary, adding electric utility steam generating units to the list of regulated source categories under CAA § 112. 65 Fed. Reg. 79,825. EPA's attempt to reconsider that finding was vacated by the D.C. Circuit in *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008).

21. On February 16, 2012, EPA promulgated a rule pursuant to Section 112 establishing national emissions standards for power plants. 77 Fed. Reg. 9,304. The lawfulness of EPA's "appropriate and necessary" finding that triggered regulation under Section 112 was affirmed by the D.C. Circuit in *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014). Subsequently, the Supreme Court held that EPA unlawfully failed to consider costs when deciding whether to regulate under Section 112 and remanded the matter to the D.C. Circuit without vacating the rule. *Michigan v. EPA*, __ U.S. __, No. 14-46, 2015 WL 2473453 (June 29, 2015).

22. Upon exercising its asserted discretion to list electric utility steam generating units as a regulated source category under Section 112 of the Clean Air Act, EPA by operation of law lost authority under Section 111(d) to mandate that states establish standards of performance for existing sources in that category.

C. The EPA Power Plan

23. On June 18, 2014, EPA proposed a rule to regulate greenhouse gas emissions from existing fossil-fuel-fired power plants pursuant to CAA § 111(d) (the "EPA Power Plan"). 79 Fed. Reg. 34,830. The EPA Power Plan is intended to extend federal authority over all aspects of the production, distribution, and use of electricity, with an aim of reducing carbon-dioxide emissions from the power sector by 30 percent by 2030, relative to 2005 levels. *Id.* at 34,832. It aims to achieve that goal by requiring states to overhaul their "production, distribution and use of electricity."

24. EPA describes its Power Plan as a "plant to plug" approach that comprehensively addresses all aspects of energy production and consumption based on "the interconnected nature of the power sector." EPA Fact Sheet (June 2, 2014), *available at* http://www2.epa.gov/sites/production/files/2014-05/documents/20140602fs-plan-flexibilty.pdf; 79 Fed. Reg. at 34,845. EPA stated its position that "anything that reduces the emissions of affected sources may be considered a 'system of emission reduction'" for purposes of Section 111. 79 Fed. Reg. at 34,886.

25. The EPA Power Plan identified four means of reducing carbon-dioxide emissions from the power sector, which it calls "building blocks." These building blocks recognize that, to implement the "best system of emission reduction," states will have to (1) require power plants to make changes to increase their efficiency in converting fuel into energy, (2) replace coal-fired generation capacity with increased use of natural gas, (3) replace fossil-fuel-fired generation with nuclear and renewable sources, such as wind and solar, and (4) mandate more efficient use of energy by consumers.

26. The EPA Power Plan specifies numerical "emission rate-based CO_2 goals" for each state. 79 Fed. Reg. at 34,833. These rate-based goals are based on

projected emissions reductions that EPA believes can be achieved through the combination of the four "building blocks" that it says represent a baseline "best system of emission reduction." Accordingly, the "goals" differ from state to state.

27. The EPA Power Plan requires states to submit state plans to achieve interim and final goals that EPA has specified for each state.

28. The EPA Power Plan's "building blocks," in one combination or another, are the only ways that a state could reorganize its electric generating capacity to achieve the targets set by EPA.

29. The EPA Power Plan relies almost entirely on "beyond-the-fenceline" measures—that is, regulation of things other than the categories or subcategories of sources that it has listed for regulation under Section 111(d). States have no choice but to undertake such "beyond-the-fenceline" measures to achieve the targets set by EPA.

30. EPA recognizes that states will be required to undertake such "beyond-the-fenceline" measures. In testimony before Congress, Administrator McCarthy stated that EPA's plan is "really . . . an investment opportunity. *This is not about pollution control.* . . . It's about investments in renewables and clean energy."

31. EPA and Administrator McCarthy have determined that they possess the legal authority to regulate in the manner laid out in the EPA Power Plan and that such regulation is appropriate. They have determined to promulgate a final rule that maintains the goal of reducing carbon-dioxide emissions from the power sector by 30 percent by 2030, relative to 2005 levels; that maintains the "building block" approach and the specific "building blocks"; and that requires states to submit state plans to achieve state-specific goals based on the "building blocks."

32. These determinations are reflected in the rule that EPA delivered to the Office of Management and Budget on June 3, 2015.

33. EPA has stated that it intends to take official final action on its Power Plan in late August. In reality, EPA's action already imposes substantial obligations on regulated entities—the states.

D. The EPA Power Plan Requires Oklahoma To Restructure Its Energy Sector

34. Although states are, in principle, free to achieve the goals established by the EPA Power Plan in any manner, or to decline to submit a state plan and allow EPA to promulgate a federal implementation plan, achieving the goals without plunging the states' electric supply system into chaos and threatening continuity of electric service will require wholesale restructuring of states' electricity sectors. This is true of Oklahoma, which will suffer all of the following burdens.

35. An electric system consists of numerous sources of electricity connected to consumers through a transmission grid. To ensure that electric service is reliable, the supply of electricity across all electricity generating sources must exceed the highest possible demand among all consumers. In order to maintain reliability and to provide electricity at a low cost to consumers, state regulation controls the order in which particular sources are "dispatched" to meet demand. In general, large coal-fired facilities, which provide affordable and reliable power, operate 24 hours per day year-round, barring maintenance outages, to satisfy "base load" demand. Smaller, more-expensive generators (often powered by natural gas) operate on a fairly regular schedule to meet cyclical demand and are often called "cycling" units. Older and less efficient coal- and gas-fired units operate during times of particularly high demand, such as hot summer days, to satisfy "peaking" demand. The order in which sources are dispatched generally depends on such factors as cost, transmission capacity, and the characteristics of local generating units. The percentage of a generation source's total capacity that is actually used over a period of time is its "utilization rate."

36. States will be required to revise statutory and regulatory systems that govern dispatch among power plants to reduce the use of coal-fired power plants, even though these plants typically supply base load power in state energy systems. That change, in turn, will require additional state actions to ensure that customers in areas relying on coal-fired plants are not left without power or forced to bear unreasonable costs. It will also require substantial changes to utility regulation systems that put cost and reliability first in dispatch determinations.

37. States will be required to revise statutory and regulatory systems that govern dispatch among power plants to increase the utilization rates of natural gas-fired power plants, even though maintaining what appears to be "excess" capacity is essential to integrating renewable energy sources into the grid.

38. States will be required to develop or incentive zero-emissions generation, which will require authorizing legislation and expenditures. Developing sources of alternative energy will also require that state regulators take action to integrate those sources into the grid. It will also inevitably implicate other environmental requirements, such as endangered-species protection, that states must address at considerable burden and expense.

39. States must address how increased renewable-energy capacity, which may fluctuate, fits into the transmission system and dispatch, as well as how such capacity will be compensated. In states where it is not feasible to add renewable capacity, or that do not receive credit for such capacity that is exported, other measures will be required, such as participation in interstate programs for the purchase and sale of energy, typically requiring new statutory authority, significant groundwork in negotiating compacts between and among states, creation of a multi-state entity to administer the program, and time to accomplish all of this.

40. States must enact programs to reduce electricity demand in an enforceable fashion, requiring legislative and regulatory action. States with

deregulated or partially deregulated electricity markets will face particular challenges because power plants may be independent of power distribution companies.

41. Achieving the goals of the EPA Power Plan will also require direct regulation of consumers of electricity, which will be a new mission for state environmental and utility regulators.

42. Inevitably, states will be required to force the owners of coal-fired power plants to retire those units, resulting in substantial challenges to maintaining electric service for all customers, ensuring that plant operators are appropriately compensated, and ensuring that the financial impact on electricity consumers is acceptable.

43. In sum, the EPA Power Plan will require states to overhaul their regulation of electricity and public utilities and to take numerous regulatory and other actions to comply with and accommodate the Proposed Rule while maintaining electric service, let alone affordability and reliability.

44. And that will be the case even for states that take no direct action and become subject to a federal plan, due to states' pervasive regulation of state power systems, transmission, and utilities.

45. EPA lacks the authority to undertake regulation of state power systems, transmission, and utilities, even though carrying out its Power Plan will require the exercise of such regulatory authority. Accordingly, the EPA Power Plan will require states to exercise such regulatory authority, whether or not they submit state plans.

E. The EPA Power Plan Is Currently Causing Oklahoma Irreparable Harm

46. Planning for power plants, transmission, and other aspects of electric generation and transmission is an intensive, years-long process. It can take six years or more from the time that the need for a new transmission project has been

identified to the time that it is placed into service. Likewise, power plants take years to plan, construct, and integrate into the grid.

47. Such planning is undertaken by the State of Oklahoma in conjunction with utilities, the Southwest Power Pool, and other entities.

48. Energy regulation in the State of Oklahoma is primarily the responsibility of the Oklahoma Corporation Commission ("OCC"), an independent regulatory agency created in 1907 that regulates rates charged and services provided by investor-owned electric utilities and reviews triennial integrated resource plans that the utilities submit. The Commission also regulates the exploration, production, storage, distribution, and intrastate transportation of oil and gas. The Oklahoma Municipal Power Authority regulates utilities operated by local governments within the State. The Oklahoma Department of Environmental Quality ("ODEQ") is charged with implementing and enforcing the State's various environmental regulatory programs, including those relating to the Clean Air Act. The Secretary of Energy and Environment is responsible for oversight and coordination of the state's energy and environmental authorities and for assisting in the development of the state's overall energy and resource policy. Finally, the Energy Office within the state's Department of Commerce promotes renewable energy and energy efficiency. Within the limits of the authorization of the Oklahoma Legislature, these governmental entities administer a comprehensive regulatory scheme for Oklahoma's power sector.

49. According to the U.S. Energy Information Administration, coal-fired facilities located within Oklahoma generated 29,301,758 megawatt hours of power in 2012. That accounts for more than 37 percent of all power generated within the State in 2012.

50. The EPA Power Plan sets a goal of 35.5 percent reduction in power-plant greenhouse gas emissions for Oklahoma by 2030. It also sets an "interim goal" of 33 percent by 2020.

51. Nowhere near a 33-percent, much less a 35.5-percent, reduction in emissions can be achieved through "inside-the-fenceline" emission-control measures that are achievable at those units.

52. The only way that a 33-percent reduction in emissions could occur by 2020 would be through the mass retirement of coal-fired plants.

53. Even EPA recognizes that "inside-the-fenceline" efficiency improvements are insufficient to achieve the goals it set for the State of Oklahoma. EPA projects that improvements in coal-plant efficiency will be able to yield only negligible reductions in carbon-dioxide emissions. Accordingly, EPA recognizes that shuttering coal plants and/or "beyond-the-fenceline" measures will be required for Oklahoma to achieve EPA's goals.

54. Even with "beyond-the-fenceline" measures that may somewhat ease the need for retirements, EPA projects that the EPA Power Plan will cause an increase of approximately 200 percent in retiring generating capacity in and around Oklahoma relative to current expectations. In other words, even if the State of Oklahoma accedes to EPA's coercion and commandeering and agrees to regulate its own citizens in the manner that EPA has specified, the State will still see substantial reductions in generating capacity that require it to take further regulatory measures to ensure electric reliability.

55. Whether the State of Oklahoma adopts a state plan to meet EPA's goals or EPA promulgates a federal implementation plan, the EPA Power Plan forces the State of Oklahoma to undertake substantial legislative, regulatory, planning, and other activities.

56. The State of Oklahoma's regulatory agencies lack statutory authority to carry out the second, third, and fourth of EPA's "building blocks." Doing so therefore requires legislative authorization and then implementing regulations.

57. Integrating new renewable energy sources into the grid will require substantial State effort, over a period of years, regarding planning, permitting, and construction.

58. Increasing the dispatch of natural gas-fired power plants will also require extensive planning and regulatory activities, as well as permitting and construction of new facilities, over a period of years. Current excess capacity in Oklahoma's existing natural gas plants is required to accommodate the variable nature of renewable sources like wind and solar.

59. Likewise, adding additional renewable sources will also require planning, permitting, and constructing additional natural gas or other traditional sources to account for variable production.

60. In sum, due to the EPA Power Plan, simply maintaining electric service across the State of Oklahoma requires substantial expenditures of time, effort, and money by the Oklahoma Legislature, OCC, ODEQ, and other state actors, as well as private utilities. These expenditures cannot be recouped. If the State does nothing while EPA implements anything like a 35.5-percent reduction in carbon-dioxide emissions from Oklahoma's coal-fired power plants, the lights will go out in many Oklahoma communities, impacting State governmental operations, as well as the health and welfare of citizens. The same is true of the 33 percent "interim goal" set by EPA and would be true of even a substantially smaller goal, on the order of 15 or 20 percent.

61. These activities cannot be undertaken in anything like the EPA Power Plan's timeline, which allows states only five years or less to meet "interim goals." At a minimum, the State of Oklahoma will require eight years to undertake the

activities that are required to maintain electric service. Accordingly, carrying out the EPA Power Plan requires that state officials engage in planning, regulatory, and other activities in advance of a nominally final rule.

62. Many of these activities are irreversible and/or cause the State of Oklahoma irreparable injury. For example, devoting administrative manpower to activities required by the EPA Power Plan prevents the State from undertaking other activities in its sovereign capacity. Being forced by the federal government to change its own laws and to exercise aspects of its police power subjects the State of Oklahoma to *per se* sovereign injury. Actions taken now and decisions made now—for example, committing to new projects necessary to maintain electric service—will cost the State of Oklahoma money and manpower in the years ahead.

63. Once the EPA Power Plan is finalized—but not until it is finalized—Oklahoma will have recourse to challenge it in the D.C. Circuit by means of a petition for review of EPA's final action under Section 307 of the Clean Air Act. Oklahoma can reasonably expect that it will take, at minimum, nine months from the time the petition is filed to the time the D.C. Circuit will issue a final decision invalidating the Proposed Rule. It may take much longer.

64. Even if Oklahoma is able to obtain a stay of the EPA Power Plan in the D.C. Circuit, that is still likely to take months.

65. By that time, Oklahoma will have either implemented or taken irreversible steps towards implementing most, if not all, of the changes described above, meaning that they will be implemented even though the EPA Power Plan is certain to be invalidated.

66. The ordinary petition process under Section 307 is not an adequate means of obtaining the relief required if Oklahoma is to maintain its power sector in anything like the form it exists today and if it is to forgo the massive expenditure of resources required to accommodate the EPA Power Plan. The EPA Power Plan will

result in the complete restructuring of Oklahoma's power sector even though it has no chance of surviving eventual judicial scrutiny.

F. The EPA Power Plan Is Plainly *Ultra Vires*

67. The EPA Power Plan plainly exceeds EPA's authority under the Clean Air Act and the authority of the Federal Government under the United States Constitution in at least five separate respects.

68. First, the EPA Power Plan violates the provision of Section 111(d) that precludes EPA from requiring states to establish existing source standards of performance for sources that are part of "a source category which is regulated under section [112 of the CAA]" because EPA has already acted to regulate coal-fired power plants under Section 112.

69. Second, the EPA Power Plan's "building block" approach is not a permissible "best system of emission reduction" under Section 111, particularly due to the serious constitutional doubt caused by EPA's interpretation of that term.

70. Third, the EPA Power Plan's rigid numerical goals for each state, based on its existing sources, violates Section 111(d)'s mandate that EPA allow states to "take into consideration . . . the remaining useful life of the existing source to which such standard applies."

71. Fourth, as described above, the EPA Power Plan unlawfully commandeers the states, in excess of Congress's Article I authority and in violation of the Tenth Amendment to the U.S. Constitution.

72. Fifth, the EPA Power Plan unlawfully coerces the states, in excess of Congress's Article I authority and in violation of the Tenth Amendment to the U.S. Constitution, by threatening to withhold states' highway funding, to impose substantial injuries on states' citizens, and to severely impair states' exercise of their police powers if they do not comply with EPA's demands.

CLAIMS FOR RELIEF

COUNT I: DECLARATORY RELIEF

73. Paragraphs 1 through 72 are incorporated herein by reference as if set forth in full.

74. An actual controversy exists between Defendants and the State of Oklahoma regarding the lawfulness of the EPA Power Plan under the Clean Air Act and United States Constitution.

75. The State of Oklahoma is entitled to a declaration of its rights under the Clean Air Act and United States Constitution pursuant to 28 U.S.C. §§ 2201 and 2202.

COUNT II: INJUNCTIVE RELIEF

76. Paragraphs 1 through 72 are incorporated herein by reference as if set forth in full.

77. The State of Oklahoma has a strong likelihood of success on the merits of this case because Defendants' action is plainly unlawful and the State lacks any meaningful and adequate opportunity for judicial review in light of the enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry, as well as other injuries, caused by Defendants' action.

78. The State of Oklahoma is suffering irreparable injury as a result of Defendants' unlawful actions. Defendants' interference with state statutes, violation of the State's constitutional rights through commandeering and coercion, and interference with the exercise of the State's police power all constitute *per se* irreparable harm. The State is also injured by the substantial expenditure of state resources, injuries to its citizens and economy, and abrogation of its legitimate policymaking discretion for years into the future.

79. Defendants will suffer no injury at all if they are enjoined.

80. An injunction would serve the public interest, by preventing violation of the United States Constitution and abrogation of state sovereignty and avoiding substantial economic injury and job loss.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray the Court grant them the following relief:

A. A declaration that the EPA Power Plan violates the Clean Air Act, that Defendants lack authority to regulate coal-fired power plants under Section 111(d) of the Clean Air Act, that Defendants lack authority to directly or indirectly prescribe "outside-the-fenceline" measures under Section 111(d), and that the EPA Power Plan exceeds Congress's Article I authority and violates the Tenth Amendment to the U.S. Constitution;

B. A preliminary injunction forbidding Defendants from regulating coal-fired power plants under Section 111(d) of the Clean Air Act and from taking any action to enforce the EPA Power Plan;

C. A permanent injunction forbidding Defendants from regulating coal-fired power plants under Section 111(d) of the Clean Air Act and from taking any action to enforce the EPA Power Plan; and

D. Such other relief as the Court deems just and proper.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) STATE OF OKLAHOMA
ex rel. E. Scott Pruitt,
in his official capacity as Attorney
General of Oklahoma,
and

(2) OKLAHOMA
DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Plaintiffs,

v.

(1) GINA MCCARTHY, in her
official capacity as Administrator
of the U.S. Environmental
Protection Agency,
and

(2) U.S. ENVIRONMENTAL
PROTECTION AGENCY,

Defendants.

Case No. 15-CV-369-CVE-FHM

Plaintiffs' Motion for a Preliminary Injunction

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs State of Oklahoma and Oklahoma Department of Environmental Quality respectfully move the Court for entry of an order preliminarily enjoining Defendants from regulating electric utility generating units under Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), and from taking any action in furtherance of or to enforce such regulation.

As shown in the accompanying brief in support of this motion, Plaintiffs are likely to succeed on the merits of their claim that Defendants' actions to regulate greenhouse gas emissions from existing electric utility generating units pursuant to Section 111(d) are plainly

IN THE UNITED STATES DISTRICT COURT
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(1) STATE OF OKLAHOMA
ex rel. E. Scott Pruitt,
in his official capacity as Attorney
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and

(2) OKLAHOMA
DEPARTMENT OF
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Plaintiffs,

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Brief in Support of
Plaintiffs' Motion for a Preliminary Injunction

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Table of Contents

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 2

A. Statutory Background 2

B. EPA Promulgates Section 112 Standards for Power Plants 2

C. The EPA Power Plan Compels the State of Oklahoma To Reorganize Its Energy Economy 3

ARGUMENT 5

I. Oklahoma Is Likely To Succeed on the Merits Because the EPA Power Plan Plainly Violates the Clean Air Act and U.S. Constitution 5

A. The EPA Power Plan Violates the Section 112 Exclusion 6

B. The EPA Power Plan's Beyond-the-Fenceline "Building Block" Approach Is Not a Permissible "Best System of Emission Reduction" 13

C. The EPA Power Plan's Target-Based Approach Violates Oklahoma's Statutory Right To Consider Sources' Remaining Useful Lives 17

D. The EPA Power Plan Unlawfully Coerces Oklahoma 18

1. The Power Plan is per se coercive 18

2. The Power Plan is coercive because it imposes a "choice" that is neither knowing nor voluntary 20

i. The Power Plan's choice is not "knowing" 20

ii. The Power Plan's choice is not "voluntary" 21

E. The EPA Power Plan Unlawfully Commandeers Oklahoma 22

F. "Best System of Emission Reduction" Must Be Given Its Plain Meaning To Avoid Serious Constitutional Doubt 24

II. Oklahoma Is Suffering Irreparable Injury to Its Sovereign and Other Interests Due to Defendants' *Ultra Vires* Actions 24

III. The Balance of the Equities and Public Interest Require an Injunction 27

IV. This Court Has Jurisdiction and Authority To Enjoin Defendants' Plainly *Ultra Vires* Action 28

CONCLUSION 30

Table of Authorities

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 30

AEP v. Connecticut, 131 S. Ct. 2527 (2011) 6

Allstate Insurance Co. v. Brown, 16 F.3d 225 (7th Cir. 1994) 8

Astoria Federal Savings & Loan Association v. Solimino, 501 U.S. 104 (1991) 9

Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012) 25, 27

Bell v. Hood, 327 U.S. 678 (1946) 28

Bethlehem Steel Corp. v. EPA, 651 F.2d 861 (3d Cir. 1981) 16

Central Hudson Gas & Electric Corp. v. EPA, 587 F.2d 549 (2d Cir. 1978) 1

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Chamber of Commerce of United States v. Edmondson, 594 F.3d 742 (10th Cir. 2010) 26, 27

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Gonzales v. Oregon, 546 U.S. 243 (2006) 13

Hancock v. Train, 426 U.S. 167 (1976) 16

Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981) 18, 19

In re Murray Energy Corp., __ F.3d __, Nos. 14-1112, 14-1151, 14-1146, 2015 WL 3555931 (D.C. Cir. June 9, 2015) 29

Kansas v. United States, 249 F.3d 1213 (10th Cir. 2001) 25

Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001) 25

King v. Burwell, __ U.S. __, No. 14-114, 2015 WL 2473448 (June 25, 2015) 12, 13

Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50 (2004) 10

Leedom v. Kyne, 358 U.S. 184 (1958) 1, 28, 29
Lundeen v. Mineta, 291 F.3d 300 (5th Cir. 2002) 28
Michigan v. EPA, __ U.S. __, No. 14-46, 2015 WL 2473453 (June 29, 2015) 3
Mount Hawley Insurance Co. v. Dania Distribution Center, 763 F. Supp. 2d 1359 (S.D. Fla. 2011) 8
New Jersey v. EPA, 517 F.3d 574 (D.C. Cir. 2008) 8
New York v. United States, 505 U.S. 144 (1992) 18, 22, 23, 24
NFIB v. Sebelius, 132 S. Ct. 2566 (2012) 18, 20, 21, 22
Norfolk Southern Railway Co. v. Solis, 915 F. Supp. 2d 32 (D.D.C. 2013) 29
PepsiCo, Inc. v. FTC, 472 F.2d 179 (2d Cir. 1972) 26, 27, 29, 30
PPG Industries, Inc. v. Harrison, 660 F.2d 628 (5th Cir. 1981) 16
Printz v. United States, 521 U.S. 898 (1997) 22, 24
Riverside Irrigation District v. Stipo, 658 F.2d 762 (10th Cir. 1981) 28
Seneca-Cayuga Tribe of Oklahoma v. Oklahoma, 874 F.2d 709 (10th Cir. 1989) 25
Simmat v. United States Bureau of Prisons, 413 F.3d 1225 (10th Cir. 2005) 28
South Dakota v. Dole, 483 U.S. 203 (1987) 22
United States v. Jin Fuey Moy, 241 U.S. 394 (1916) 24
Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427 (2014) 12
Watt v. Alaska, 451 U.S. 259 (1981) 13
White Stallion Energy Center, LLC v. EPA, 748 F.3d 1222 (D.C. Cir. 2014) 3
Whitman v. American Trucking Associations, 531 U.S. 457 (2001) 12
WMATA v. Holiday Tours, 559 F.2d 841 (D.C. Cir. 1977) 27
Wyandotte Nation v. Sebelius, 443 F.3d 1247 (10th Cir. 2006) 25

STATUTES

16 U.S.C. § 792 *et seq.* 21
16 U.S.C. § 824 21
28 U.S.C. § 1331 28
42 U.S.C. §§ 7408–7410 6
42 U.S.C. § 7408 8
42 U.S.C. § 7411(a) 2, 14
42 U.S.C. § 7411(b) 8, 14, 16

42 U.S.C. § 7411(d) ..... *passim*
42 U.S.C. § 7411(e) 14
42 U.S.C. § 7411(h) 15
42 U.S.C. § 7412 ..... *passim*
42 U.S.C. § 7475 16
42 U.S.C. § 7607 ..... 28, 30
Pub. L. No. 101-549, 104 Stat. 2399 (1990) 9, 10
Revisor's Note, 42 U.S.C. § 7411 10

OTHER AUTHORITIES

40 C.F.R. § 60.8 15
40 C.F.R. § 60.14 15
40 C.F.R. § 60.21 16
40 C.F.R. § 60.22 16
69 Fed. Reg. 4,652 (Jan. 30, 2004) 7
70 Fed. Reg. 15,994 (Mar. 29, 2005) 6, 9, 11, 12
77 Fed. Reg. 9,304 (Feb. 16, 2012) 2
79 Fed. Reg. 34,830 (June 18, 2014) ..... *passim*
79 Fed. Reg. 36,880 (June 30, 2014) 17
EPA, Air Emissions From Municipal Solid Waste Landfills – Background Information For Final Standards And Guidelines (1995) 6
EPA Brief, *In re Murray Energy Corp.*, No. 14-112 (D.C. Cir. filed Mar. 9, 2015), ECF No. 1541205 ..... 8, 9
EPA Fact Sheet (June 2, 2014) 3
EPA, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units (2014) 7, 12, 17
Lawrence E. Filson & Sandra L. Strokoff, The Legislative Drafter's Desk Reference (CQ Press, 2d ed. 2008) 10
Final Brief of Respondent, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097) 7
Prof. Michael Greve, Library of Law & Liberty, June 11, 2015 1
Donald Hirsch, Drafting Federal Law (U.S. House Office of Legislative Counsel, 2d ed. 1989) 10
House Legislative Counsel, Manual on Drafting Style (1995) 10

Legislative Drafting Manual, Office of the Legislative Counsel, United States Senate (1997) 10

MATS Rule RIA (2011) 3

Okla. Exec. Order No. 2015-22 (Apr. 28, 2015) 25

Okla. SB No. 676 25

Petitioner's Opening Brief, *In re Murray Energy Corp.*, No. 14-1112 (D.C. Cir. filed Mar. 9, 2015), ECF #1541126 10

Settlement Agreement, EPA-HQ-OGC-2010-1057-0002 27

Southwest Power Pool, SPP's Reliability Impact Assessment of the EPA's Proposed Clean Power Plan (2014) 5

Introduction

The Clean Air Act does not empower Defendants U.S. Environmental Protection Agency and EPA Administrator Gina McCarthy to compel states to fundamentally restructure the generation, transmission, and regulation of electricity within their borders. To the contrary, it specifically denies them that authority, as does the U.S. Constitution's bar on federal commandeering and coercion of the states. Nonetheless, Defendants are now acting, under the purported authority of the Clean Air Act, to force states to phase out coal-fired generation in favor of natural gas, renewables, and enforceable restrictions on electricity consumption. By "proposing" that states carry out these mandates at breakneck pace, Defendants' "EPA Power Plan" has left states no choice but to begin work now on the necessary changes to their laws and programs governing electricity, well before any court has an opportunity to review a "final" rule. The whole point of their rush is to create irreversible facts on the ground so that no court "will be able to unscramble this particular omelet"—the epitome of irreparable injury.[1]

But the courts are not impotent in the face of *ultra vires* agency action, even when recourse at law may be lacking. Relying on equity, a long line of cases holds that "a district court appropriately 'interrupts' agency action on the ground that the agency is acting outside its statutory authority." *Central Hudson Gas & Electric Corp. v. EPA*, 587 F.2d 549, 555 (2d Cir. 1978). *See also Leedom v. Kyne*, 358 U.S. 184 (1958). This Court should interrupt Defendants' blatantly unlawful actions so as to enforce the clear requirements of federal law and to relieve the State of Oklahoma from substantial ongoing injury to its sovereign, quasi-sovereign, and fiscal interests. To those ends, the Court should enter the requested preliminary injunction.

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[1] Prof. Michael Greve, Library of Law & Liberty, June 11, 2015, http://www.libertylawsite.org/2015/06/11/dream-weaver-in-chief/.

Background

A. Statutory Background

In 2009, the Obama Administration pushed Congress to enact legislation capping carbon-dioxide emissions by fossil-fuel-fired power plants. The effort ultimately failed, which was recognized at the time as a major defeat for the President's policy agenda. Now the Administration, through Defendants, is attempting to achieve the same goal via the exercise of purported authority under Section 111(d) of the Clean Air Act that, if it actually existed, would have rendered the 2009 legislation completely superfluous.

Section 111(d), 42 U.S.C. § 7411(d), charges states to establish and apply "standards of performance" for certain existing stationary sources of air pollutants. A "standard of performance" is "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction." § 7411(a)(1). Under Section 111(d), EPA "establish[es] a procedure" for states to submit plans establishing such standards and providing for their implementation and enforcement. EPA's procedure must allow states "to take into consideration, among other factors, the remaining useful life" of a source. Only if a state fails to submit a compliant plan may EPA step in and promulgate a federal plan to regulate sources within a state directly. § 7411(d)(2).

The statutory text contains three express limitations on the coverage of Section 111(d), one of which is relevant here: EPA may not mandate that states establish standards of performance for existing sources that are part of "a source category which is regulated under section [112, 42 U.S.C. § 7412]." Section 112 is a more recent Clean Air Act program regulating emissions of "hazardous air pollutants" that has generally supplanted the need for new Section 111(d) standards.

B. EPA Promulgates Section 112 Standards for Power Plants

On February 16, 2012, EPA promulgated Section 112 emission standards for power plants. 77 Fed. Reg. 9,304. That rule—one of the most expensive regulations in the history of the United States—was upheld in *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014). In particular, the D.C. Circuit upheld EPA's determination that it was "appropriate" to regulate power plants under Section 112, rather than rely on other programs to achieve reductions of power plant emissions. *Id.* at 1243–46. Subsequently, the Supreme Court held that EPA unlawfully failed to consider costs when deciding whether to regulate under Section 112 and remanded the matter to the D.C. Circuit without vacating the rule. *Michigan v. EPA*, __ U.S. __, No. 14-46, 2015 WL 2473453 (June 29, 2015). EPA projects that its Section 112 rule will result in the retirement of 4,700 megawatts of coal-fired generating capacity and require tens of billions of dollars in investments for the remaining facilities to achieve compliance by the April 16, 2016 deadline. EPA, MATS Rule RIA 6A-8, ES-2 (2011).[2]

C. The EPA Power Plan Compels the State of Oklahoma To Reorganize Its Energy Economy

At the same time that utilities are making final decisions whether to upgrade or retire coal-fired facilities in response to the Section 112 rule, Defendants are moving forward with a rule to regulate greenhouse gas emissions from existing fossil-fuel-fired power plants pursuant to Section 111(d) (the "EPA Power Plan"). 79 Fed. Reg. 34,830 (June 18, 2014). The EPA Power Plan aims to reduce carbon-dioxide emissions from the power sector by 30 percent by 2030, relative to 2005 levels, by requiring states to overhaul their "production, distribution and use of electricity." *Id.* at 34,832/3. Under what EPA calls a "plant to plug

[2] *Available at* http://www.epa.gov/ttnecas1/regdata/RIAs/matsriafinal.pdf.

approach,"[3] "anything that reduces the emissions of affected sources may be considered a 'system of emission reduction'" for purposes of Section 111. 79 Fed. Reg. at 34,886/1.

The EPA Power Plan specifies numerical "emission rate-based CO_2 goals" for each state. 79 Fed. Reg. at 34,833/1. These goals are based on projected emissions reductions that EPA believes can be achieved through the combination of four "building blocks" that it says represent a baseline "best system of emission reduction": (1) require power plants to make changes to increase their efficiency in converting fuel into energy, (2) replace coal-fired generation capacity with increased use of natural gas, (3) replace fossil-fuel-fired generation with nuclear and renewable sources, such as wind and solar, and (4) mandate more efficient use of energy by consumers. 79 Fed. Reg. at 34,836/1. In other words, the EPA Power Plan requires states to transition away from coal-fired generation and take all steps that are necessary to integrate other generating sources and to maintain electric service. EPA, however, lacks the authority to carry out all but the first of these building blocks itself, as well as supporting actions necessary to reorganize the production, regulation, and delivery of electricity.

Yet EPA recognizes that such "beyond-the-fenceline" measures, or simply shuttering coal-fired plants, will be required for Oklahoma to comply with the EPA Power Plan. Coal accounts for over 35 percent of electricity generated within Oklahoma, and the EPA Power Plan requires Oklahoma facilities to slash utility emissions by 33 percent in 2020 and 35.5 percent in 2030. EPA acknowledges that "inside-the-fenceline" efficiency improvements are incapable of achieving anywhere near that magnitude of reductions. 79 Fed. Reg. at 34,861/1 (assuming that efficiency measures could reduce emissions by 6 percent). Accordingly, whether Oklahoma adopts a state plan to meet these targets or EPA promulgates a federal

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[3] EPA Fact Sheet (June 2, 2014), *available at* http://www2.epa.gov/sites/production/files/2014-05/documents/20140602fs-plan-flexibilty.pdf.

plan, the EPA Power Plan forces the State of Oklahoma to undertake "beyond-the-fenceline" measures, as well as substantial legislative, regulatory, planning, and other activities to accommodate the changes required by the EPA Power Plan and to maintain electric service throughout the State. *See* Declaration of Brandy Wreath, Director, Public Utility Division, Oklahoma Corporation Commission, at ¶¶ 2–14 ("Wreath Decl."). For example, EPA projects that the EPA Power Plan will cause an increase of approximately 200 percent in retirements of generating capacity in and around Oklahoma relative to current expectations,[4] and Oklahoma agencies are undertaking planning and other regulatory activities to obtain replacement capacity and integrate it into the State's electric system. Wreath Decl. ¶¶ 3, 5–6, 12–15.

Because the EPA Power Plan requires its goals to be met at a breakneck pace, and constructing and integrating new capacity is a years-long process, states have no choice but to begin carrying out EPA's commands at this time. Wreath Decl. ¶¶ 12–15. The Oklahoma Corporation Commission, the State's chief utility regulator, is currently hard at work to ensure that the EPA Power Plan does not cause interruptions of electric service in Oklahoma or unacceptably undermine reliability or affordability. Wreath Decl. ¶¶ 2, 13–14. The Oklahoma Municipal Power Authority, Secretary of Energy and Environment, and Energy Office within the state's Department of Commerce are also currently laboring to carry out the Plan's dictates. Wreath Decl. ¶ 3. In short, due to the EPA Power Plan, simply maintaining electric service across the State of Oklahoma—which the State requires to exercise its police power and other core functions and which is essential to the health and welfare of its citizens—is forcing the State to make substantial expenditures of time, effort, money, and resources. Wreath Decl. ¶ 2. These are outlays that it will never be able to recoup.

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[4] Southwest Power Pool, SPP's Reliability Impact Assessment of the EPA's Proposed Clean Power Plan 2 (2014) (discussing EPA projections), *available at* http://goo.gl/jLBeXz.

Argument

I. Oklahoma Is Likely To Succeed on the Merits Because the EPA Power Plan Plainly Violates the Clean Air Act and U.S. Constitution

By attempting to contort an obscure Clean Air Act program to fulfill a major regulatory role for which it was never intended, Defendants' actions under Section 111(d) fundamentally clash with the statutory text. This is so even if Defendants substantially alter the details of their actions, short of a wholesale abandonment of their goal of restructuring state electricity systems along the lines they favor. The statutory text must be given its plain meaning, both to carry out Congress's intentions and to avoid violation of the anti-commandeering and anti-coercion principles of the U.S. Constitution.

A. The EPA Power Plan Violates the Section 112 Exclusion

Congress could not have stated more clearly that EPA may not require states to issue "standards of performance for any existing source for any air pollutant…emitted from a source category which is regulated under section [112]." 42 U.S.C. § 7411(d)(1)(A)(i). EPA promulgated Section 112 regulations for electric utility generating units—that is, power plants—in 2012. Defendants therefore lack authority to require emissions standards for power plants—full stop.

The Supreme Court recognized the plain meaning of the Section 112 exclusion in *AEP v. Connecticut*, 131 S. Ct. 2527 (2011), which specifically concerned power plants' greenhouse gas emissions. It stated: "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under the national ambient air quality standard program, §§ 7408–7410, or the 'hazardous air pollutants' program, § 7412. *See* § 7411(d)(1)." *Id.* at 2537 n.7. The statutory text, the court saw, is unambiguous on this point.

EPA likewise has recognized for years, until quite recently, that "a literal reading" of this statutory language codified at 42 U.S.C. § 7411(d)(1) mandates "that a standard of

performance under section 111(d) cannot be established for any air pollutant—HAP and non-HAP—emitted from a source category regulated under section 112."[5] 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005). *Accord* EPA, Air Emissions From Municipal Solid Waste Landfills – Background Information For Final Standards And Guidelines 1-6 (1995)[6] (explaining that the Section 112 exclusion applies "if the designated air pollutant is…emitted from a source category regulated under section 112"); Final Brief of Respondent at 105, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097) ("[A] literal reading of this provision could bar section 111 standards for any pollutant, hazardous or not, emitted from a source category that is regulated under section 112."); 69 Fed. Reg. 4,652, 4,685 (Jan. 30, 2004) ("A literal reading…is that a standard of performance under CAA section 111(d) cannot be established for any air pollutant that is emitted from a source category regulated under section 112."); EPA, Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units 26 (2014)[7] ("[A] literal reading of that language would mean that the EPA could not regulate any air pollutant from a source category regulated under section 112."). *See also id.* at 22 ("[T]he Section 112 Exclusion appears by its terms to preclude from section 111(d) any pollutant if it is emitted from a source category that is regulated under section 112.").

Of course, where the "literal reading" of the text is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984). And that should be the end of the matter here: the statute unambiguously bars EPA from requiring states to establish performance standards for a source category, like power plants, that is already regulated under Section 112.

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[5] "HAP" refers to "hazardous air pollutant," the type of emissions regulated under Section 112.

[6] *Available at* http://www.epa.gov/ttn/atw/landfill/bidfl.pdf.

[7] *Available at* http://goo.gl/Spwl32.

The statutory text plainly precluding their regulatory aims, Defendants attempt to manufacture ambiguity, so as to give themselves interpretative discretion to do as they please. Before the D.C. Circuit, EPA argued, first, that it could interpret Section 111(d)(1)(A)(i)[8] as requiring the agency to regulate so long as at least one of its three exclusionary clauses is not satisfied. EPA Brief at 36–37, *In re Murray Energy Corp.*, No. 14-112 (D.C. Cir. filed Mar. 9, 2015), ECF No. 1541205 ("EPA *Murray* Brief"). "In other words, the literal language of section 7411(d) provides that the Administrator may require states to establish standards for an air pollutant so long as *either* air quality criteria have not been established for that pollutant, or one of the remaining criteria is met." *Id.* But that's absurd: there are no pollutants that wouldn't satisfy that standard,[9] meaning that EPA has an affirmative statutory obligation (ignored up to the present) to mandate state-by-state standards under Section 111(d) for every pollutant for every source category subject to Section 111(b) new source performance standards. This interpretation also fails as a matter of standard English usage. When an "exclusion clause" contains multiple "disjunctive subsections," "the exclusion applies if any one of the [multiple] conditions is met." *Mt. Hawley Ins. Co. v. Dania Distrib. Ctr.*, 763 F. Supp. 2d 1359, 1365 (S.D. Fla. 2011). *Accord Allstate Ins. Co. v. Brown*, 16 F.3d 222, 225 (7th Cir. 1994). For example, if a landlord advertises for a tenant who is "not a smoker or pet owner or drug user," the landlord does not want a tenant who meets any—not just one—of those criteria. Indeed, the D.C. Circuit vacated EPA's Section 111(d) rule regulating the emission of mercury from power plants

[8] EPA may require states to "establish[] standards of performance for any existing source for any air pollutant (i) [1] for which air quality criteria have not been issued or [2] which is not included on a list published under section 7408(a) of this title or [3] emitted from a source category which is regulated under section 7412 of this title." 42 U.S.C. § 7411(d)(1)(A) (bracketed text added to identify the three "exclusionary clauses").

[9] The first restriction is that the pollutant be one "for which air quality criteria have not been issued." The second is that the pollutant not be included on a list of pollutants "for which air quality criteria had not been issued before December 31, 1970." 42 U.S.C. § 7408(a). Taken together, that's the full universe of pollutants.

because it violated the Section 112 exclusion, even though it did not violate the other exclusionary clauses. *New Jersey*, 517 F. 3d at 583.

Second, EPA argued that it could interpret Section 111(d)(1)(A)(i) as affirmatively obligating it to regulate source categories that are already subject to Section 112 regulation, based on "the lack of a negative before the third clause." EPA *Murray* Brief at 37. Again, this is absurd: why would Congress specifically *require* EPA to impose still more regulation on sources already subject to the Act's most stringent and burdensome program? Certainly EPA has never recognized that obligation. In any case, this interpretation can be confidently rejected because it would render the exclusionary language regarding Section 112 completely superfluous; after all, Section 111(d) requires the regulation of "any existing source" even without that language. *See Astoria Fed. Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (statutes must be interpreted "so as to avoid rendering superfluous any parts thereof").[10]

Finally, EPA made much of an alleged ambiguity in the Statutes at Large based on purportedly inconsistent amendments to Section 111(d)(1)(A)(i) (the exclusion provision) contained in the Clean Air Act Amendments. The first is a substantive amendment to Section 111(d) (the "House Amendment"). Before 1990, the Section 112 exclusion prohibited EPA from requiring States to regulate under Section 111(d) any air pollutant "included on a list published under...112(b)(1)(A)." 42 U.S.C. § 7411(d) (1989). This meant that if EPA had listed a pollutant under Section 112, the agency could not regulate that pollutant under Section 111(d). In order "to change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category

[10] EPA also argued that the phrase "source category which is regulated under section [112]" is also somehow ambiguous, because "an agency must consider *what* is being regulated," and because "which" might not actually modify "source category." EPA *Murray* Brief at 37–38. Plaintiffs believe these arguments require no response other than to suggest that they reflect EPA's desperation to conjure up agency-empowering ambiguity.

that is actually regulated under section 112," 70 Fed. Reg. at 16,031, the House Amendment instructs:

> strik[e] "or 112(b)(1)(A)" and insert[] "or emitted from a source category which is regulated under section 112."

Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990).

The second amendment (the "Senate Amendment") appears in a list of "Conforming Amendments" that make clerical changes to the Act. Conforming amendments are "amendment[s] of a provision of law that [are] necessitated by the substantive amendments or provisions of the bill." Legislative Drafting Manual, Office of the Legislative Counsel, United States Senate 28 (1997) ("Senate Manual"). Consistent with this description, the Senate Amendment merely updated the cross-reference in the Section 112 exclusion. It instructs:

> strik[e] "112(b)(1)(A)" and insert[] in lieu thereof "112(b)".

Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990). This clerical update was necessitated by the fact that substantive amendments expanding the Section 112 regime—broadening the definition of "hazardous air pollutant" and changing the program's focus to source categories—had renumbered and restructured Section 112(b).

As an initial matter, there is no true conflict between the amendments. Amendments are to be executed in the order of their appearance, House Legislative Counsel, Manual on Drafting Style 42 (1995); Senate Manual 33,[11] and the House Amendment appears first in the 1990 Act, striking the reference to "112(b)(1)(A)." Accordingly, the Senate Amendment simply fails to have any effect, because it is no longer necessary to "strik[e] '112(b)(1)(A)'" to

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[11] *See also* Donald Hirsch, Drafting Federal Law § 2.2.3, p.13 (U.S. House Office of Legislative Counsel, 2d ed. 1989); Lawrence E. Filson & Sandra L. Strokoff, The Legislative Drafter's Desk Reference § 14.4, p.191 (CQ Press, 2d ed. 2008). The Supreme Court recognizes these treatises as authoritative on legislative drafting. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60–61 n.4 (2004); *id.* at 71 (Scalia, J., dissenting).

conform the Section 112 exclusion to the revised Section 112.[12] *See* Revisor's Note, 42 U.S.C. § 7411. The U.S. Code provision, in other words, fully enacts both amendments.

In any case, the U.S. Code provision is also consistent with Congress's intent in enacting both amendments, which address somewhat different aspects of the scope of EPA's authority. The House Amendment added a limitation to the scope of Section 111(d): where a category of sources is regulated under Section 112, Section 111(d) cannot be used to impose additional performance standards on that source category. The purpose was to ensure that existing source categories regulated under Section 112—which the 1990 Act substantially revised to focus on source categories rather than pollutants—would not face the prospect of additional costly regulation under Section 111. *See* 70 Fed. Reg. at 16,031 (EPA discussion of legislative history concluding that the House Amendment sought to avoid "duplicative or overlapping regulation").

The Senate Amendment had a different focus, seeking to maintain the pre-1990 prohibition on using Section 111(d) to regulate emissions from existing sources of hazardous air pollutants regulated under Section 112. Failure to retain that limitation would have allowed EPA to undo Congress's considered decision to regulate only certain sources of hazardous air pollutants: the 1990 Act requires EPA to regulate all major sources of hazardous air pollutants, but only those area sources representing 90 percent of area source emissions, thereby exempting many smaller sources and sparing them the burden of the stringent Section 112 regime.[13] 42 U.S.C. § 7412(c)(3). In other words, the Senate

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[12] The failure of a subsequent amendment to have any effect, due to changes made by an earlier amendment in the same legislation, is not at all unusual. Plaintiffs are aware of more than 30 other instances—including dozens in Title 42 alone—in which an amendment to the U.S. Code failed to have any effect due to an earlier amendment. Petitioner's Opening Brief at 31–32 n.9, *In re Murray Energy Corp.*, No. 14-1112 (D.C. Cir. filed Mar. 9, 2015), ECF #1541126.

[13] "Major" sources emit or have the potential to emit above a statutorily prescribed threshold of hazardous air pollutants; "area" sources are those that fall below this threshold. 42 U.S.C. § 7412(a)(1)–(2).

Amendment serves to restrain EPA from circumventing this limitation by simultaneously regulating the same emissions under both Section 112 and 111(d) and thereby burdening all sources, even the ones Congress sought to exempt from regulation.

Thus, by blocking both double regulation and circumvention of the Section 112(c)(3) area source limitation, the U.S. Code provision achieves Congress's intent underlying both amendments.

EPA's interpretation does not. In the agency's view, the existence of the two amendments somehow renders the provision ambiguous—to the point that it can ignore the House Amendment entirely. In a legal memorandum released contemporaneously with the EPA Power Plan, it concluded that "section 111(d) authorizes the EPA to establish section 111(d) guidelines for [greenhouse gas] emissions from [power plants]" because greenhouse gases "are not a HAP regulated under section 112." EPA, Legal Memorandum 27. This reasoning, of course, solely reflects the Senate Amendment—that is, the exclusion applies on a pollutant-by-pollutant basis—and inexplicably discards the text and purpose of the substantive House Amendment.[14] But no case has ever held that a regulatory agency has license to pick and choose which provisions of the statutory law it will follow, and EPA's contention to the contrary seriously misapprehends the constitutional limitations on its interpretative authority. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) ("The very choice of which portion of the power to exercise…would *itself* be an exercise of the forbidden legislative authority."). *Chevron* deference could not, and does not, extend anywhere near so far. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014) ("Agencies exercise discretion only in the interstices created by statutory silence or ambiguity.").[15] Instead, an agency or court "must read [allegedly conflicting] statutes to give

[14] This is despite the fact that EPA has actually recognized that inclusion of the conforming *Senate* Amendment was "a drafting error." 70 Fed. Reg. at 16,031.

[15] The two-step *Chevron* framework would not apply here even if the statutory question were one involving statutory silence or ambiguity. First, the statutory question is one "of deep

effect to each if [it] can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Thus, even assuming *arguendo* that there is a potential conflict between the amendments, EPA's self-serving interpretation must be rejected because it deprives the House Amendment of any effect.

In sum, an administrative agency cannot manufacture ambiguity to expand its interpretative license and ability to pursue its policy goals. The Section 112 exclusion is an express limitation on EPA's regulatory authority, and the agency should not be permitted to read it out of the statute. The statute means what it says, EPA cannot require states to issue performance standards for source categories already subject to Section 112 regulation, and any attempt by EPA to subject power plants to Section 112 regulation is therefore *ultra vires*.

B. The EPA Power Plan's Beyond-the-Fenceline "Building Block" Approach Is Not a Permissible "Best System of Emission Reduction"

The EPA Power Plan is also unlawful because it relies on "beyond-the-fenceline" measures that do not concern the emissions performance of individual sources and are therefore outside the regulatory scope of Section 111(d). In EPA's view, "anything that reduces the emissions of affected sources may be considered a 'system of emission reduction'" for purposes of Section 111. 79 Fed. Reg. at 34,886/1. But while the first "building block"—reducing emissions by improving sources' efficiency—may be lawful to

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'economic and political significance,'" such that, "had Congress wished to assign that question to an agency, it surely would have done so expressly." *King v. Burwell*, __ U.S. __, No. 14-114, 2015 WL 2473448, at *8 (June 25, 2015) (quoting *Util. Air. Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)). Indeed, in the one instance where Congress did intend for EPA to exercise discretion on a major question regarding the regulation of power plants, it did say so expressly. *See* 42 U.S.C. § 7412(n)(1)(A). Second, it is "especially unlikely" that Congress would have delegated that question to EPA, which has "no expertise" in regulating electricity production and transmission. *King*, 2015 WL 2473448, at *8 (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–67 (2006)). To the limited extent that such questions are addressed at all by federal law, Congress has assigned them to the agency with expertise in the field, the Federal Energy Regulatory Commission. *Compare FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155–57 (2000).

the extent that it is "achievable,"[16] measures that involve reducing the utilization of coal-fired power plants in favor of other generation sources or reducing energy consumption are not permissible components of the "best system of emission reduction" that underlies a Section 111 standard. 42 U.S.C. § 7411(a)(1).

This is plain on the face of the statute. First, Section 111(d) requires states to "establish[] standards of performance *for any existing source*" that is already subject to a new source performance standard. § 7411(d)(1)(A) (emphasis added). Likewise, Section 111(d) requires EPA to establish "standards of performance *for new sources*" within listed categories. § 7411(b)(1)(B) (emphasis added). These provisions simply do not authorize obligations regarding *other sources*—for example, that application of a performance standard to a coal-fired plant would require increased utilization of some other facility that is not subject to the standard. Confirming as much, Section 111(e) enforces new source performance standards by providing that it is "unlawful for any owner or operator" of a regulated source to violate any such applicable standard. § 7411(e). There is no enforcement provision, however, for owners or operators of other facilities, such as those that EPA would have pick up the slack from decreased utilization of regulated facilities.

Second, a "best system of emission reduction," which is used to determine an emission standard, must be both "achievable" and "adequately demonstrated," but those requirements would be nullified if decreased utilization (which is always an achievable and adequately demonstrated means of reducing emissions) in favor of other sources or reduced output were a permissible basis for a performance standard. § 7411(a)(1). Achievability, the D.C. Circuit has long held, must therefore be demonstrated with respect to the regulated source category itself. *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973).

[16] Setting aside, for the sake of argument, the Section 112 exclusion and the "remaining useful life" limitation discussed below.

Third, Section 111 expressly regulates sources' emissions "performance," which concerns the rate of emissions at a particular level of production, and not the level of production. In other words, mandating that a high-emissions facility reduce production may reduce emissions, but it has nothing to do with that facility's emissions *performance*.[17] Indeed, in its Section 111 regulations, EPA determines "performance" by measuring "pollutant emission rates" with respect to particular levels of production. 40 C.F.R. § 60.8(e). Similarly, its regulations do not regard "[a]n increase in production rate of an existing facility" as a modification triggering application of new source performance standards. 40 C.F.R. § 60.14(e).

Fourth, Section 111(h) directly contradicts EPA's broad definition of "system." That provision allows EPA to promulgate a work practice or other non-output-based standard if the agency determines that it is "not feasible to prescribe or enforce a standard of performance." § 7411(h). A "standard of performance" is infeasible, that provision provides, when "a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant" or when use of such equipment would be unlawful, § 7411(h)(2)(A)—that is, when *source-based equipment* like emissions controls is infeasible. The characteristics of other facilities that might substitute for the regulated one are irrelevant.

Fifth, Section 111(d) expressly authorizes states applying performance standards to take into consideration "the remaining useful life of the existing source to which such standard applies," again without saying anything about the characteristics of other facilities. § 111(d)(1)(B).

Sixth, it is counterintuitive (to say the least) that a program expressly regulating the emissions of "existing sources" could require the construction of new sources that are, in

[17] Analogously, the "performance" of a mutual fund is its rate of return over time, not its size in terms of assets under management or the number of trades it conducts.

turn, subject to a variety of additional programs regulating new sources. *E.g.*, 42 U.S.C. §§ 7411(b), 7475.

In light of these statutory features, the courts have had no difficultly in recognizing that "best system of emission reduction" refers to "inside-the-fenceline" measures. The Supreme Court, viewing this language, recognized that it refers to "technologically feasible emission controls"—that is, emission-reduction technologies implemented at the source. *Hancock v. Train*, 426 U.S. 167, 193 (1976). *See also Bethlehem Steel Corp. v. EPA*, 651 F.2d 861, 869 (3d Cir. 1981) ("system" is something that a source can "install"); *PPG Indus., Inc. v. Harrison*, 660 F.2d 628, 636 (5th Cir. 1981) (holding that, prior to an amendment authorizing operational standards, EPA could not "require a use of a certain type of fuel" that would reduce emissions).

EPA's own regulations reflect the same understanding. Its regulations establishing procedures for state plans pursuant to Section 111(d) define compliance in terms of the purchase and construction of "emission control systems" and "emission control equipment," as well as other "on-site" activities. 40 C.F.R. § 60.21(h). They require EPA to publish guidelines "containing information pertinent to control of the designated pollutant form [sic] designated facilities," which in turn refers to "any existing facility which emits a designated pollutant." §§ 60.22(a), 60.21(b) (cross-reference omitted). Likewise, EPA's guidelines must reflect "the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated *for designated facilities*." § 60.22(b)(5) (emphasis added). These citations are just the tip of the iceberg. A complete recitation of all the EPA regulatory actions that treat "best system of emission reduction" as referring to on-site measures would go on for pages. A recent example is the agency's proposed performance standards for new power plants—released less than two weeks after the EPA Power Plan—which reaffirms that Section 111 standards of

performance "apply to sources" and must be "based on the BSER achievable at that source." 79 Fed. Reg. 36,880, 36,885 (June 30, 2014).

The absurdity of EPA's novel interpretation should not be overlooked. If reduced utilization and substituted production are permissible measures, promulgation of a performance standard for greenhouse gas emissions associated with oil refineries could give EPA regulatory authority over all means of transportation in the United States. In the same way that EPA here would have states impose enforceable programs to reduce electricity demand, the agency might order states to mandate that refineries pay people to drive less or take public transportation. *Compare* EPA, Legal Memorandum 14 (EPA may require states to take any measures that "displace, or avoid the need for, generation from the affected [power plants]."). Surely it could require that refineries produce more diesel than gasoline, a less-efficient fuel with respect to emissions, and to cease producing aircraft fuel altogether. And if all that proved insufficient, it might simply require that refineries reduce output in favor of solar-power-vehicle mandates and the like. *See id.* at 51 ("system of emission reduction" "encompasses virtually any 'set of things' that reduce emissions"). Yes, the idea that Congress in Section 111(d) authorized EPA to seize regulatory control of the transportation system is absurd, but no more so than EPA's action here to seize control of the electric system.

C. The EPA Power Plan's Target-Based Approach Violates Oklahoma's Statutory Right To Consider Sources' Remaining Useful Lives

A further indication of the clash between EPA's actions and its statutory authority is that its target-based approach eviscerates Section 111(d)'s clear requirement that the agency must allow states, in applying performance standards, "to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." § 7411(d)(1)(B). By mandating that states achieve EPA-specified reduction targets by certain dates, the EPA Power Plan unlawfully deprives states of the authority to vary the

application of a performance standard to particular sources. Whatever a source's remaining useful life—whether five years or fifty—EPA's targets and deadlines remain unchanged and unalterable. This defect is fundamental, precluding EPA from proceeding with any action that that imposes specific reduction targets on states. The EPA Power Plan's regulatory approach is simply incompatible with the requirements of Section 111(d).

D. The EPA Power Plan Unlawfully Coerces Oklahoma

1. The Power Plan is per se coercive

The EPA Power Plan violates the cardinal constitutional principle that the federal government is one of limited and enumerated powers. If the Plan is allowed to stand, administrative agencies can, under the guise of commerce-based "cooperative federalism," evade limits on the reach of the Commerce Clause. In *NFIB v. Sebelius*, the Court reiterated that, "the power to regulate commerce, though broad indeed, has limits." 132 S. Ct. 2566, 2589 (2012) (opinion of Roberts, C.J.) (quotation marks omitted). When the federal government exceeds its power, it can be viewed either as a violation of the principle of limited and enumerated powers, or as a violation of state sovereignty, since the "two inquiries are mirror images of each other," *New York v. United States*, 505 U.S. 144, 156 (1992). *See also id.* at 159. In this case, the "choice" presented to States under the EPA's Power Plan exceeds the scope of the preemptive authority delegated by Congress in the Clean Air Act ("CAA") and is thus *per se* coercive of States and violative of the principle of federalism.

The preemption power is the basis of all Commerce Clause-based cooperative federalism. In *Hodel v. Virginia Surface Mining and Reclamation Association*, the Court upheld the Surface Mining Control and Reclamation Act, because Congress possessed preemptive power to regulate mining activities that affected interstate commerce. 452 U.S. 264, 289–90 (1981). The Court emphasized, "Congress could constitutionally have enacted a statute

prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role." *Id.* at 290.

Likewise, in *FERC v. Mississippi*, the Court upheld portions of the Public Utilities Regulatory Policies Act ("PURPA") because, "[a]s we read them, [the PURPA provisions] simply establish requirements for continued state activity *in an otherwise pre-emptible field*." 456 U.S. 742, 769 (1982) (emphasis added).

Hodel and *FERC* teach that commerce-based cooperative federalism involves a choice between: (1) regulating according to federal instructions; or (2) federal preemption. As the *FERC* Court put it, because the first choice (regulating according to federal instructions) occurs in the context of "an otherwise pre-emptible field," the choice is not coercive. When the federal government has authority to preempt, it may certainly abstain from exercising this power and offer States the less aggressive option of continued state regulatory primacy, albeit exercised pursuant to federal instructions. *Hodel* and *FERC* also illustrate that the choices posed by a Commerce Clause-based cooperative federalism regime must occupy the same preemptive scope—i.e., federal preemptive authority must encompass the instructions it is encouraging States to follow. If such preemptive harmony exists between choice one (regulate according to federal instructions) and choice two (federal preemption), States have a meaningful, voluntary choice and may, if they wish, simply relinquish their entire regulatory authority and allow the federal government to "take the wheel."

The Clean Air Act unquestionably does not preempt state law in areas *unrelated* to emissions, such as the transmission, distribution, or consumption of energy, nor does EPA claim otherwise. Accordingly, EPA lacks authority under the CAA to regulate beyond-the-fenceline. But this is precisely what EPA is attempting to do: coerce States into regulating areas beyond-the-fenceline, in which EPA itself *has no preemptive authority*.

When the Commerce Clause-based cooperative federalism choices given to States do not occupy the same preemptive scope, a "preemptive mismatch" arises, posing a unique threat to federalism. In a preemptive mismatch, the federal government gives States a choice between: (1) regulating according to federal instructions; or (2) preemption of a *different* field. Such a preemptive mismatch "choice" is inherently coercive. It has never been attempted, much less upheld, as it would allow the federal government to coerce States into altering their laws that do not conflict with federal law and that the federal government, itself, cannot impose via preemption. "The National Government received [from the Constitution] the power to enact its own laws and to enforce those laws over conflicting state legislation. *The States retained the power to govern as sovereigns in fields that Congress cannot or will not pre-empt.*" *FERC*, 456 U.S. at 795 (O'Connor, J., concurring in the judgment in part and dissenting in part) (emphasis added).

Sanctioning such a "choice" under the guise of Commerce Clause-based "cooperative federalism" would grant the federal government a power to accomplish indirectly what it cannot do directly, thereby circumventing the limits of the Commerce Clause, eviscerating the principle of limited and enumerated powers, and coercing the States.

2. *The Power Plan is coercive because it imposes a "choice" that is neither knowing nor voluntary*

i. The Power Plan's choice is not "knowing"

Cooperative federalism regimes are "in the nature of a contract." *NFIB v. Sebelius*, 132 S. Ct. at 2602 (Roberts, C.J.) (quotation marks omitted); *id.* at 2659 (Scalia, J., dissenting). The constitutionality of cooperative federalism "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* at 2602 (quotation marks omitted); *id.* at 2660 (Scalia, J., dissenting). To constitute a "knowing" choice, States must understand the nature and consequences of the available choices. *Id.* at 2602 (state choice must be both knowing and voluntary to be non-coercive); *id.* at 2659–60 (Scalia, J., dissenting) (same).

The Power Plan is beyond the reasonable expectation of the States, either at the time the CAA was enacted in 1970, or at the time it was last amended in 1990. States could not have known, when they entered into the CAA's cooperative federalism regime, that EPA could take over the entire field of energy regulation, from plant to plug. At no time during the 45-year history of the Clean Air Act has any prior administration claimed such sweeping power. Indeed, in the Federal Power Act, Congress explicitly declared that regulation of non-emissions matters is a state responsibility. 16 U.S.C. § 792 *et seq.* The federal government's interest extends only to transmission, generation, and sale of electricity "in interstate commerce" and "such Federal regulation, however,...extend[s] only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a).

The EPA's Power Plan is a material deviation from the decades-old cooperative federalism regime that has respected states' authority over beyond-the-fenceline matters such as generation, distribution, and consumption, and thus represents "a shift in kind, not merely degree." *NFIB*, 132 S. Ct. at 2605 (Roberts, C.J.). Cooperative federalism "does not include surprising participating States with post-acceptance or 'retroactive' conditions" that dramatically transform the original expectations of States when they agreed to cooperate. *Id.* at 2606 (quotation marks omitted).

ii. The Power Plan's choice is not "voluntary"

Any "choice" made by States under EPA's Power Plan is not "voluntary." To constitute a "voluntary" choice, States must have a genuine opportunity of "not yielding," *NFIB*, 132 S. Ct. at 2603 (Roberts, C.J.) (quotation marks omitted); *see also id.* at 2661 (Scalia, J., dissenting) ("[T]heoretical voluntariness is not enough.").

If States decline to regulate according to federal instructions, EPA will impose a federal plan. 79 Fed. Reg. at 34,951/2. Because EPA's preemptive authority under the CAA is limited to emissions, the federal plan will be aimed at reducing emissions from coal-fired

facilities. It will force plant retirements and cripple States' existing electricity generation. Consequently, States will be forced to adopt "beyond-the-fenceline" measures to maintain affordable and reliable electric service. These measures are not "'the prerogative of the States,'" *NFIB*, 132 S. Ct. at 2604 (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)), but a direct result of EPA's placing a "gun to the [States'] head," forcing them to revamp their regulatory structure to prevent disruption of affordable, reliable electric service. *Id.* To prevent these ineluctable consequences, States have no meaningful choice but to begin carrying out EPA's dictates and regulate beyond-the-fenceline, and are thus being coerced.

E. The EPA Power Plan Unlawfully Commandeers Oklahoma

EPA's Power Plan is remarkably similar to the "choice" struck down in *New York v. United States*, 505 U.S. 144 (1992). In *New York*, the Low-Level Radioactive Waste Policy Act required States to: (1) dispose of low-level radioactive waste; or (2) take title to such waste and be subject to any liability therefor. *Id.* at 153–54. This was unconstitutional because "in this [take title] provision, Congress *has not held out the threat of exercising its spending power or its commerce power; it has instead held out the threat, should the States not regulate according to one federal instruction, of simply forcing the States to submit to another federal instruction.* A choice between two unconstitutionally coercive regulatory options is no choice at all. Either way, the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program, an outcome that has never been understood to be within the authority conferred upon Congress by the Constitution." *Id.* at 176 (emphasis added) (citation and quotation marks omitted). *See also Printz v. United States*, 521 U.S. 898 (1997) (extending the anti-commandeering principle to state executive officials).

In *New York*, the government unsuccessfully argued that the "the latitude given to the States to implement Congress' plan" enabled States "to regulate pursuant to Congress' instructions in any number of different ways," such as by forming regional compacts. *New*

York, 505 U.S. at 176. Such flexibility "only underscore[d] the critical alternative a State lacks: A State may not decline to administer the federal program. No matter which path the State chooses, *it must follow the direction of Congress*." *Id.* at 176–77 (emphasis added). EPA's Power Plan likewise commanders States to regulate as directed by the federal government—only it is worse, since Congress has commanded no such thing, giving EPA authority only to regulate emissions, not the entire energy sector. The EPA's Power Plan is designed to force States to obey beyond-the-fenceline regulatory commands that EPA does not possess authority to issue.

If the federal government wants to issue a regulatory command, it must use its proper preemptive power. "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Id.* at 178.

EPA has been remarkably candid that its Power Plan commands state action. It expects that compliance will require state "public utility commission orders." 79 Fed. Reg. at 34,914/3. It recognizes that "affected entities" include any "entity that is regulated by the State, such as an electric distribution utility, or a private or public third-party entity." *Id.* at 34,917/3. It even demands that States "demonstrate… sufficient legal authority" to enforce beyond-the-fenceline measures. *Id.* These things reflect EPA's awareness that the Plan will require far more than just emissions controls; it will require States to revamp their entire energy sector, in conformity with EPA's commands.

Even States that default to EPA's federal plan will still be forced to implement beyond-the-fenceline measures satisfactory to EPA. Because the federal plan will effectively

mandate retirement of many coal-fired plants and reductions in the utilization of others, States must enact measures to meet existing energy needs, including identifying alternative energy sources and devising incentives to reduce demand. The enormous burden and complexity of these duties, as well as the years-long lead-times involved in performing them, is why States like Oklahoma have no choice but to begin work now to carry out EPA's dictates. The EPA Power Plan treats States as "administrative agencies of the Federal Government." *New York*, 505 U.S. at 188. For that reason, the EPA Power Plan commandeers States, as in *New York* and *Printz*, thus exceeding the federal government's power.

F. "Best System of Emission Reduction" Must Be Given Its Plain Meaning To Avoid Serious Constitutional Doubt

Even assuming *arguendo* that the scope of "best system of emission reduction," standing alone, is somewhat ambiguous, EPA's anything-to-reduce-emissions interpretation must still be rejected to avoid serious constitutional doubt with respect to commandeering and coercion of the States. Federal courts must construe statutes, "if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Such an acceptable construction is available here: consistent with plain meaning, "best system of emission reduction" must be limited to on-site measures to avoid constitutional infirmity.

II. Oklahoma Is Suffering Irreparable Injury to Its Sovereign and Other Interests Due to Defendants' *Ultra Vires* Actions

Defendants' actions are causing the State of Oklahoma to suffer ongoing irreparable injury to its sovereign and other interests. Unless this Court intervenes to enjoin Defendants' actions, Oklahoma's injuries will soon increase dramatically, as the State is forced to prepare for implementation of the EPA Power Plan and make decisions that will be difficult or impossible to reverse.

To begin with, Defendants' unconstitutional invasion of Oklahoma's sovereign interests inflicts *per se* irreparable injury on the State. In general, "'[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.'" *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012) (alteration in original) (quoting *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001)). And in particular, interference with sovereign status is "sufficient to establish irreparable harm." *Kansas v. United States*, 249 F.3d 1213, 1227–28 (10th Cir. 2001). *See also Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006); *Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989). Here, the EPA Power Plan unconstitutionally commandeers and coerces the instruments of the State in theory and in fact. As described above, states like Oklahoma have no choice but to begin work now to implement the EPA Power Plan, whether or not they intend to submit a state plan. And as a factual matter, this is what Oklahoma officials are doing right now, because they have to, Wreath Decl. ¶¶ 12–15, despite unified opposition to the policies underlying the EPA Power Plan expressed by the State legislature, Okla. SB No. 676 (enrolled but vetoed bill rejecting EPA Power Plan approach), and its Executive Branch, Okla. Exec. Order No. 2015-22 (Apr. 28, 2015) (prohibiting Dept. of Environmental Quality from preparing state plan). Given the choice, Oklahoma would decline to carry out this perversion of federal law, but the State is being deprived of that

choice, suffering injury and insult to both its sovereignty and rights under the United States Constitution.

In addition, the State also suffers irreparable injury due to the unrecoverable expenditures of effort, manpower, time, and money that the EPA Power Plan is forcing it to undertake. Wreath Decl. ¶¶ 2, 9. "Imposition of monetary damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury." *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010).

Oklahoma will also soon suffer additional injury as it and its utilities are forced to make irreversible decisions affecting future investments in energy resources within the State. Due to the combination of the EPA Power Plan's aggressive deadlines and the long lead-time required to bring new energy infrastructure online, regulatory and investment decisions with long-term impacts are being made now. *See, e.g.*, Wreath Decl. ¶¶ 8, 15. Moreover, states and utilities are making decisions now about the future viability of coal-fired power plants in the face of impending compliance deadlines under EPA's Section 112 rule, and the risk of millions in additional expenditures to comply with the EPA Power Plan will tip the balance for some facilities. Decisions made in the coming months to shutter existing coal-fired facilities, to authorize new natural gas and renewable capacity, and to expand grid capacity to replace lost capacity all involve irreversible aspects. And that is the point of the EPA Power Plan: to change the facts on the ground, irreversibly, before any court has the opportunity to review Defendants' "final" action. The Court should not countenance this blatant attempt to circumvent judicial review to impose long-term burdens on states, utilities, and ultimately electricity consumers.

Finally, it must be observed that this is not the usual challenge to an agency rulemaking. The EPA Power Plan demands that states reorganize their energy economies from top to bottom, forcing them to abandon affordable coal-fired generation in favor of

new renewable capacity, to regulate electricity consumption, and to cede their traditional policymaking authority over electricity markets and utilities to federal regulators. In this instance, "[t]he injury against which a court would protect is not merely the expense to the plaintiff of defending in the administrative proceeding...but...the enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry." *PepsiCo, Inc. v. FTC*, 472 F.2d 179, 187 (2d Cir. 1972) (Friendly, C.J.). In such circumstances, when "an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law," injunctive relief is appropriate. *Id.*

III. The Balance of the Equities and Public Interest Require an Injunction

Put plainly, Defendants "do[] not have an interest in enforcing a law that is likely constitutionally infirm." *Edmondson*, 594 F.3d at 771. And "it is always in the public interest to prevent the violation of a party's constitutional rights." *Awad*, 670 F.3d at 1132 (quotation marks omitted). Plaintiffs' likelihood of success on the merits is therefore reason enough to enter a preliminary injunction.

In addition, a preliminary injunction would do little more than preserve the *status quo* that has existed from the dawn of electricity generation in the United States, allowing Oklahoma to continue to exercise its traditional policy discretion over utilities and the State's electric system. The Obama Administration EPA, having waited six years to regulate power plants' greenhouse gas emissions, cannot now claim that there is any particular urgency to its regulatory actions during the few months necessary for this Court to consider and rule on the merits of Plaintiffs' challenge. Indeed, EPA has already allowed its deadlines regarding its Power Plan to slip numerous times, amounting to several years' delay.[18]

Finally, the public has a substantial interest "in having legal questions decided on the merits, as correctly and expeditiously as possible," rather than through administrative fiat.

[18] *See* Settlement Agreement ¶¶ 1–4, EPA-HQ-OGC-2010-1057-0002 (settlement obligating EPA to sign Section 111(d) standards by May 26, 2012).

WMATA v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977). Absent a stay, Defendants' Power Plan will remain in force, forcing the states to adopt burdensome laws and regulations that cannot be easily repealed, and to make decisions that cannot be reversed, even if the Plan is ultimately vacated. The public should not have to bear that burden. Nor should the public, as citizens of the states, be forced to bear the cost of developing new regulatory regimes that are likely to prove unnecessary or even detrimental.

IV. This Court Has Jurisdiction and Authority To Enjoin Defendants' Plainly *Ultra Vires* Action

"This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Leedom*, 358 U.S. at 190. As required, Plaintiffs' "non-statutory" challenge to Defendants' *ultra vires* actions is supported by ordinary federal question jurisdiction and states a proper claim upon which relief may be granted. *See Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1230–31 (10th Cir. 2005). The Court can and should address the merits of this motion.

As for jurisdiction, Oklahoma's allegations that Defendants act in violation of federal law are sufficient because 28 U.S.C. § 1331 supplies jurisdiction over suits presenting federal questions. *See id.* (citing *Bell v. Hood*, 327 U.S. 678, 681–82 (1946)).

The complaint also states a proper cause of action upon which relief may be granted. Federal courts have inherent equitable authority to prevent violations of federal rights. *Id.* at 1231–32. Under *Leedom* and its many progeny, "a plaintiff may secure judicial review when an agency exceeds the scope of its delegated authority or violates a clear statutory mandate." *Lundeen v. Mineta*, 291 F.3d 300, 312 (5th Cir. 2002) (quotation omitted). *See also Riverside Irrigation Dist. v. Stipo*, 658 F.2d 762, 768 (10th Cir. 1981). Such review is available where a plaintiff lacks "a meaningful and adequate means of vindicating" its federal rights and Congress has not acted to foreclose judicial review. *Bd. of Governors of Fed. Reserve Sys. v. MCorp. Fin., Inc.*, 502 U.S. 32, 43–44 (1991).

Here, Oklahoma has no other "meaningful and adequate" opportunity for relief. The D.C. Circuit, which has exclusive statutory authority to review "nationally applicable" actions deemed by EPA to be "final," 42 U.S.C. § 7607(b), has already held that neither that statutory authority, nor the All Writs Act, allow it to review the EPA Power Plan because the agency has not deemed it "final." *In re Murray Energy Corp.*, __ F.3d __, Nos. 14–1112, 14–1151, 14–1146, 2015 WL 3555931 (D.C. Cir. June 9, 2015). Although review in that court will be available when EPA ultimately promulgates a "final" action, *Leedom* itself holds that the availability of statutorily provided review in the future is insufficient to foreclose non-statutory review where, as here, such delay would injure the plaintiffs' interests. 358 U.S. at 190 (allowing employees to challenge non-final action allegedly violating federal statutory right, even though review of final action would be available later, where lack of contemporaneous review would sacrifice or obliterate their rights). *See also Friends of Crystal River v. EPA*, 35 F.3d 1073, 1077–79 (6th Cir. 1994) (finding *ultra vires* EPA action reviewable before final agency decision); *Elmo Div. of Drive-X Co. v. Dixon*, 348 F.2d 342, 344 (D.C. Cir. 1965) (eventual review insufficient to vindicate claim that consent decree required agency to proceed against plaintiff only by reopening that previous case, not by initiating a new one). *Cf. Norfolk S. Ry. Co. v. Solis*, 915 F. Supp. 2d 32, 45 (D.D.C. 2013) (denying *Leedom* review where plaintiff "has not argued that it would experience irreparable harm" before final review).

The present case finds a close parallel in the reasoning of *PepsiCo*, which challenged a Federal Trade Commission proceeding accusing PepsiCo of hindering competition in the distribution and sale of soft drink syrups and drinks by entering into typical territorial-exclusivity contracts with its bottlers. 472 F.2d at 182. In an opinion by Judge Henry Friendly, the court explained that an agency's "refus[al] to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law" could be challenged where the agency's actions

implicate "enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry." *Id.* at 187. In that instance, immediate review would be available because targets of such action "should not be placed under that threat in a proceeding that must prove to be a nullity," as they would be if forced to wait for "final" agency action. *Id.* That is exactly the threat that Oklahoma now faces due to Defendants' conduct of a regulatory proceeding that is plainly beyond their legal authority. In fact, even worse than in *PepsiCo*, Defendants' actions are already inflicting serious and irreparable injuries on Oklahoma. In these circumstances, waiting many months for the inevitable ruling that Defendants' actions are unsupported by law is no meaningful or adequate opportunity for relief.

There is also no indication that Congress intended to foreclose judicial review in cases such as this one. "[O]nly upon a showing of 'clear and convincing evidence' of...legislative intent [to rebut 'the basic presumption of judicial review'] should the courts restrict access to judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967). Section 307(e) of the Clean Air Act provides, "Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section." 42 U.S.C. § 7607(e). But the Act says nothing about divesting other bases for relief.

Conclusion

The State of Oklahoma respectfully requests that the Court enter a preliminary injunction preventing Defendants from continuing to take actions that plainly violate the Clean Air Act and the U.S. Constitution and irreparably injure the State and the public.

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(405) 522-0669 (facsimile)
Service email: fc.docket@oag.state.ok.us
Scott.Pruitt@oag.ok.gov

Attorneys for Plaintiffs

Certificate of Service

I hereby certify that on July 2, 2015, I caused the attached motion for a preliminary injunction and brief in support thereof to be served by hand on the following:

Loretta E. Lynch
United States Attorney General
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001
202-514-2000

Danny C. Williams
United States Attorney
Northern District of Oklahoma
110 W. 7th St., Ste. 300
Tulsa, OK 74119
918-382-2700

Gina McCarthy
Administrator
United States Environmental Protection Agency
1200 Penn. Ave. NW, Mail Code 1105A
Washington, D.C. 20004
202-564-7317

Courtesy copies were also sent by certified mail.

/s/ Patrick Wyrick

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,

Plaintiff,

v.

GINA MCCARTHY, et al.,

Defendants.

Declaration of Brandy Wreath

Pursuant to 28 U.S.C. § 1746, I, Brandy Wreath, declare and state that the following is true and correct and is based on my own personal knowledge.

1. I am the Director of the Public Utility Division (the "Division") of the Oklahoma Corporation Commission ("OCC"), a position I have held since 2012. In this position, I am responsible for administering and enforcing the State's regulation of public utilities, including electric utilities, and for advising the OCC on matters relating to the regulation of electric utilities and electric service. A primary responsibility of the Division is assuring reliable utility service at the lowest reasonable cost. Division staff investigates and makes recommendations on matters such as establishment of rates or rate adjustments, changes in terms of services, and transfers of utility ownership.

2. The OCC is currently expending substantial resources—in terms of money, personnel, effort, and administrative focus—to comply with EPA's proposed regulations for existing power plants under Section 111(d) of the Clean Air Act (the "EPA Power Plan").

3. OCC staff participates in meetings regularly to coordinate regulatory responses to the EPA Power Plan with other components of the Oklahoma government, including the Oklahoma Secretary of Energy and Environment, and the Oklahoma Department of Environmental Quality. This coordination is necessary because the EPA

Power Plan touches practically every aspect of electricity production, distribution, and consumption and therefore reaches across agency jurisdictional boundaries. As far as I am aware, this required degree of coordination to accommodate a federal rule affecting the utility sector is unique, and it is, with respect to the activities required of OCC, unprecedented.

4. OCC staff participates in stakeholder meetings regularly with persons and entities affected by the EPA Power Plan, including utilities and groups representing energy consumers.

5. OCC staff is working continuously with the Southwest Power Pool ("SPP"), which is the regional transmission organization for Oklahoma and surrounding states, to evaluate the actions necessary to accommodate the EPA Power Plan, to plan infrastructure projects that will be necessary to accommodate the EPA Power Plan, and to coordinate other activities respecting the EPA Power Plan. Currently, three full time equivalent Division employees spend all or nearly all of their time working with the SPP on these activities in addition to the other transmission related issues.

6. Oklahoma utilities are engaged currently in planning to accommodate the EPA Power Plan, and the Division is working closely with them to ensure that their contemplated actions satisfy Oklahoma law, are properly coordinated with other actions affecting power supply and delivery, satisfy all relevant reliability requirements, and provide good value to ratepayers. Oklahoma utilities, as well as other power suppliers to Oklahoma consumers, are contemplating and making decisions currently regarding infrastructure changes necessary to respond to the EPA Power Plan that will be difficult or impossible to reverse once these decisions have been made.

7. Compliance with EPA environmental plans has already been a topic of at least one recovery hearing before the OCC. Recovery hearings determine which expenditures utilities may charge to ratepayers. Recovery hearings generally involve numerous intervenors—including environmental organizations—and weeks-long

hearings before an Administrative Law Judge. Months of work, in terms of person-hours, is required to prepare for this type of hearing. OCC's fees for outside experts alone amount to hundreds of thousands of dollars for these types of hearings.

8. Any OCC rule or order that reflect measures to accommodate the EPA Power Plan will impose costs on the Division for years to come, due to its monitoring and enforcement roles.

9. Numerous OCC personnel and outside contractors are currently involved in activities regarding the EPA Power Plan. This includes multiple in-house experts with expertise in accounting, economics, financial analysis, and law. I personally spend numerous hours per week working on matters relating to the EPA Power Plan. The time that OCC personnel spend on matters relating to the EPA Power Plan is time that they are unable to devote to other agency priorities; as a result, OCC has been unable to devote the manpower that it would like to other priorities.

10. At the same time, being aware that the manpower necessary to accommodate the EPA Power Plan will balloon in coming months, OCC has assigned personnel to complete tasks that would be due in those months ahead of schedule. This too limits the OCC's ability to address other responsibilities.

11. Division staff has attended and will continue to attend numerous conferences regarding the EPA Power Plan so that the OCC is best able to meet the challenges of the EPA Power Plan. This comes at a cost to the OCC, in terms of employee time and travel expenses.

12. Although EPA has yet to issue a final rule, OCC has no choice but to begin activities now to accommodate the EPA Power Plan. This is due to the EPA Power Plan's aggressive and unrealistic deadlines, the extent of the activities that will be required to accommodate the EPA Power Plan, the long lead time required to make and execute decisions regarding electric infrastructure, and the magnitude of the changes.

13. For example, determining the need for additional or new transmission capacity is a years-long process involving numerous stakeholders, and once that need is identified, another six to eight years is typically required for major projects to reach completion and be integrated into the grid.

14. If the OCC were not taking such actions at this time to prepare for the proposed EPA Power Plan, it would not be able to accommodate anything like the proposed EPA Power Plan anywhere close to the proposed schedule.

15. The same is true of the utilities regulated by the OCC. Currently they are engaged in planning and other activities, as well as making investment decisions, to attempt to comply with or accommodate the EPA Power Plan.

16. Uncertainty relating to the EPA Power Plan has complicated the planning and execution of infrastructure projects. For example, the EPA Power Plan places investments in transmission capacity at risk because plant retirements due to the EPA Power Plan may render that capacity unnecessary. Similarly, the EPA Power Plan has made power plant owners reluctant to perform upgrades at this time, due to the risk that those plants may have to be retired to accommodate the EPA Power Plan.

17. The Division is concerned deeply about the EPA Power Plan's impact on the health and welfare of Oklahoma residents. The EPA Power Plan's heavy emphasis on natural gas comes at the expense of fuel diversity, and lack of diversity increases the risk and impact of supply disruptions and price volatility. As part of its public mission, the OCC is attempting to address this issue, which EPA has so far ignored.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 29th day of June, 2015.

Brandy Wreath

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) STATE OF OKLAHOMA ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma,

and

(2) OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiffs,

v.

(1) GINA MCCARTHY, in her official capacity as Administrator of the U.S. Environmental Protection Agency,

and

(2) U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Case No. 15-CV-369-CVE-FHM

Plaintiffs' Motion for Leave to File Oversized Brief

Pursuant to Federal Rule of Civil Procedure 7 and Local Rule of Civil Procedure 7.2(c), (k)(9), Plaintiffs State of Oklahoma and Oklahoma Department of Environmental Quality respectfully move the Court for leave to file an oversized brief in support of their motion for a preliminary injunction in the above-captioned case, and state the following as grounds for granting the requested relief:

1. Plaintiffs seek a preliminary injunction to prevent Defendants from enforcing the EPA Power Plan, 79 Fed. Reg. 34,830 (June 18, 2014), or any outgrowth thereof, as well

as any regulations or other action regarding electric utility generating units under the authority of Clean Air Act Section 111(d), 42 U.S.C. § 7411(d).

2. Under Local Rule 7.2(c), all briefs are limited to 25 pages unless the Court grants leave otherwise.

3. The technical nature of the underlying statutory and regulatory context, as well as the need to address multiple substantive and jurisdictional issues, renders it difficult to adequately brief the motion for preliminary injunction within the standard 25 pages. A slight expansion of the page limit, to 30 pages, is appropriate to ensure that the Court is fully apprised of the issues raised by Plaintiffs' motion.

Relief Requested

For these reasons, Plaintiffs respectfully request that the Court enter the proposed order granting leave to file an oversized brief of 30 pages in support of their motion for a preliminary injunction.

Dated: July 1, 2015

Respectfully submitted,

/s/ E. Scott Pruitt
E. SCOTT PRUITT, OBA #15828
ATTORNEY GENERAL OF OKLAHOMA
PATRICK R. WYRICK, OBA #21874
SOLICITOR GENERAL
313 NE 21st Street
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(202) 861-1731
drivkin@bakerlaw.com

*Application for admission *pro hac vice* pending

Attorneys for Plaintiffs

Certificate of Service

I hereby certify that on July 2, 2015, I caused the attached motion for a preliminary injunction and brief in support thereof to be served by hand on the following:

Loretta E. Lynch
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United States Department of Justice
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Washington, DC 20530-0001
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Danny C. Williams
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Gina McCarthy
Administrator
United States Environmental Protection Agency
1200 Penn. Ave. NW, Mail Code 1105A
Washington, D.C. 20004
202-564-7317

Courtesy copies were also sent by certified mail.

/s/ Patrick Wyrick

Certificate of Service

I hereby certify that on July 2, 2015, I caused the attached motion for leave to file an oversized brief to be served by hand on the following:

Loretta E. Lynch
United States Attorney General
United States Department of Justice
950 Pennsylvania Ave., NW
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Danny C. Williams
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Washington, D.C. 20004
202-564-7317

Courtesy copies were also sent by certified mail.

s/ Patrick Wyrick

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) STATE OF OKLAHOMA ex rel. E. Scott Pruitt, in his official capacity as Attorney General of Oklahoma,

and

(2) OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Plaintiffs,

v.

(2) GINA MCCARTHY, in her official capacity as Administrator of the U.S. Environmental Protection Agency,

and

(3) U.S. ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Case No. 15-CV-369-CVE-FHM

Plaintiffs' Motion to Expedite Briefing on Their Motion for a Preliminary Injunction

Pursuant to Federal Rule of Civil Procedure 7 and Local Rule of Civil Procedure 7.2, Plaintiffs State of Oklahoma and Oklahoma Department of Environmental Quality respectfully move the Court to expedite briefing of their motion for a preliminary injunction in the above-captioned case. Plaintiffs state the following as grounds for the requested relief:

1. In their motion for a preliminary injunction and supporting brief, Plaintiffs demonstrate that Defendants' ongoing actions to regulate greenhouse gas emissions from

existing electric utility generating units pursuant to Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), are plainly unlawful.

2. Defendants' conduct is presently causing substantial irreparable injury to the State of Oklahoma's sovereign, quasi-sovereign, fiscal, economic, and other interests. Specifically, Defendants' conduct has left Plaintiffs no choice but to begin work now on the necessary changes to their laws and programs governing electricity. This injury will soon increase dramatically, as the State of Oklahoma will be forced to make decisions in preparation for implementing Defendants' unlawful regulatory requirements that will be difficult or impossible to reverse.

3. Defendants have expressed their intention to take additional action in furtherance of their challenged conduct in late August of this year, which will substantially accelerate and increase Plaintiffs' injuries. Expedited briefing, followed by a hearing following shortly after the close of briefing, will provide the Court sufficient time to consider the parties' arguments and decide Plaintiffs' motion prior to Defendants' taking further action.

4. Under Local Rule 7.2(e), in the regular course, parties have 21 days to file a response in opposition to a motion.

5. Given the serious, ongoing, and irreparable harm that Defendants' conduct imposes on Plaintiffs, this default briefing schedule will prevent Plaintiffs from obtaining their requested preliminary relief within a time sufficient to alleviate that harm.

6. By contrast, Defendants will suffer no material burden from acceleration of the briefing schedule here. Indeed, they have already considered and briefed many of the issues implicated by Plaintiffs' motion for preliminary injunction. *See generally In re Murray Energy Corp.*, Nos. 14-1112, 14-1151, 14-1146, 2015 WL 3555931 (D.C. Cir. June 9, 2015). The matters raised here by Plaintiffs are generally well-known to Defendants, and accordingly an

expedited briefing schedule here will confer substantial benefits on Plaintiffs while inflicting no corresponding harm on Defendants.

Relief Requested

For these reasons, Plaintiffs respectfully request that the Court enter the proposed order expediting the briefing schedule with regard to their request for a preliminary injunction. Specifically, Plaintiffs request that the Court find that they have shown good cause that briefing on their motion for a preliminary injunction should be expedited, find that Defendants will suffer no material harm if such relief is granted, order that Defendants' opposition to Plaintiffs' motion for a preliminary injunction shall be due two weeks from the date on which that motion is served on Defendants, order that Plaintiffs' reply shall be due one week from the date on which Defendants' opposition is served on Plaintiffs, and schedule an oral hearing on Plaintiffs' motion at the earliest possible opportunity following the close of briefing.

Dated: July 1, 2015

Respectfully submitted,

/s/ E. Scott Pruitt
E. SCOTT PRUITT, OBA #15828
ATTORNEY GENERAL OF OKLAHOMA
PATRICK R. WYRICK, OBA #21874
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drivkin@bakerlaw.com

*Application for admission *pro hac vice* pending

Attorneys for Plaintiffs

Certificate of Service

I hereby certify that on July 2, 2015, I caused the attached motion for a preliminary injunction and brief in support thereof to be served by hand on the following:

Loretta E. Lynch
United States Attorney General
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001
202-514-2000

Danny C. Williams
United States Attorney
Northern District of Oklahoma
110 W. 7th St., Ste. 300
Tulsa, OK 74119
918-382-2700

Gina McCarthy
Administrator
United States Environmental Protection Agency
1200 Penn. Ave. NW, Mail Code 1105A
Washington, D.C. 20004
202-564-7317

Courtesy copies were also sent by certified mail.

/s/ Patrick Wyrick

CERTIFIED MAIL

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Baker&Hostetler LLP

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Washington, D.C. 20036-5304

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) STATE OF OKLAHOMA
ex rel. E. Scott Pruitt,
in his official capacity as Attorney
General of Oklahoma,

and

(2) OKLAHOMA DEPART-
MENT OF ENVIRONMENTAL
QUALITY,

Plaintiffs,

v.

(1) GINA MCCARTHY, in her
official capacity as
Administrator of the U.S.
Environmental Protection Agency,

and

(2) U.S. ENVIRONMENTAL
PROTECTION AGENCY,

Defendants.

Case No. 15-CV-369-CVE-FHM

Plaintiffs' Notice of Compliance

On July 2, 2015, the Court directed Plaintiffs to serve on Defendants a copy of the Court's Order (Dkt. #9) setting a briefing schedule, and to promptly file notice that such service has been made. Pursuant to that Order, Plaintiffs hereby notify the Court that on July 2, 2015 a copy of the Court's Order was served by hand on persons authorized to accept service on behalf of:

Danny C. Williams
United States Attorney
Northern District of Oklahoma
110 W. 7th St., Ste. 300

Tulsa, OK 74119
918 382 2700

Loretta E. Lynch
United States Attorney General
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001
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Gina McCarthy
Administrator
United States Environmental Protection Agency
1200 Penn. Ave. NW, Mail Code 1105A
Washington, D.C. 20004
202-564-7317

Copies were also sent by certified mail.

Dated: July 3, 2015

Respectfully submitted,

/s/ Patrick R. Wyrick
E. SCOTT PRUITT, OBA #15828
ATTORNEY GENERAL OF OKLAHOMA
PATRICK R. WYRICK, OBA #21874
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drivkin@bakerlaw.com

*Application for admission *pro hac vice* pending

Attorneys for Plaintiffs

Certificate of Service

I hereby certify that on July 3, 2015, I caused the attached notice to be served via certified mail on the following:

Loretta E. Lynch
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United States Department of Justice
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918-382-2700

Gina McCarthy
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202-564-7317

s/*Patrick R. Wyrick*

OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA
313 N.E. 21ST
OKLAHOMA CITY, OK 73105

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OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

July 27, 2016

The Honorable Gina McCarthy
Administrator, U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Re: Docket EPA-HQ-OEM-2015-0725-0001; Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, Section 112(r)(7); Proposed Rule (RIN 2050-AG82)

Dear Administrator McCarthy,

As the chief legal officers of our states, we write to you to express our objection to your proposed revisions to the above-referenced Accidental Release Prevention Requirements, and to express our support for the comments filed on May 3, 2016, by Louisiana Attorney General Jeff Landry and Texas Attorney General Ken Paxton (attached hereto for ease of reference). The concerns raised by Attorneys General Landry and Paxton must be meaningfully addressed prior to finalization of this rule.

The rule potentially covers up to 12,500 facilities in the agriculture, food processing, chemical manufacturing, oil and gas, and water treatment sectors. The safety of these manufacturing, processing and storage facilities should be a priority for us all, but safety encompasses more than preventing accidental releases of chemicals, it also encompasses preventing *intentional* releases caused by bad actors seeking to harm our citizens. Your proposed rule seeks to make readily-available to the public information that you believe might be useful to the public in the event of an accidental release of chemicals. As the federal agencies responsible for national security have warned you, compiling that information and making it easily accessible also aids those who might seek to cause an intentional release for nefarious purposes, by providing those bad actors with information that would help them both select a target and exploit any security vulnerabilities their target might have.

With terrorist attacks becoming an unfortunately common occurrence, security concerns of this sort should be taken seriously, yet it appears your agency has largely dismissed them. We strongly urge

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you to rethink this course. A rule of this sort should prioritize national security and demonstrate an awareness that there are those in this world who seek to do us harm, and who might attempt to use our nation's chemical facilities as a means to do so. The proposed rule fails on this front, and should be withdrawn.

Sincerely,

Scott Pruitt
Oklahoma Attorney General

Derek Schmidt
Kansas Attorney General

Luther Strange
Alabama Attorney General

Adam Paul Laxalt
Nevada Attorney General

Mark Brnovich
Arizona Attorney General

Alan Wilson
South Carolina Attorney General

Leslie Rutledge
Arkansas Attorney General

Sean Reyes
Utah Attorney General

Pamela Jo Bondi
Florida Attorney General

Brad Schimel
Wisconsin Attorney General

Sam Olens
Georgia Attorney General

E. Scott Pruitt
Attorney General of Oklahoma
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The Honorable Gina McCarthy
Administrator, U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

20460-

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA

June 16, 2011

Regina A. McCarthy
Assistant Administrator for the Office of Air and Radiation
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator McCarthy:

On May 3rd, the U.S. Environmental Protection Agency published in the Federal Register its proposal for new national emission standards for hazardous air pollutants from coal and oil-fired electric utility steam generating units.

We are currently reviewing the proposal and its supporting documentation in anticipation of submitting detailed comments to your agency. We note that only 60 days have been provided to review and comment on the proposal, which includes an administrative record of several thousand pages of new regulatory provisions and technical documents.

We are particularly concerned over the proposed rule's impacts on the Oklahoma economy, the reliability of our electric grid and the extra burden it will impose on our permitting authorities. The proposal's stringent new standards will apply to all power plants located in Oklahoma and are expected to involve significant compliance costs and widespread installation of new emission control technologies. Where new control technologies are deemed prohibitively expensive, facilities could be forced to shut down prematurely, which can undermine local economic bases. Where new control technologies are economically viable, the proposed rule's extremely short compliance window of three years raises questions over whether too many facilities will be taken offline at the same time in order to make upgrades, thereby posing risks to grid reliability. This new proposal also comes at a time when questions already exist over whether our permitting authorities will be able to implement other current and pending EPA air rules, with this new proposal only adding to their expected workload.

Additionally, given the high compliance costs associated with installing new emission controls, we are concerned over the scale of electricity rate increases our

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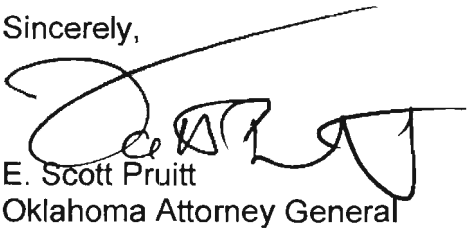
state's Public Utilities Division will be asked to consider, as well as the economic impacts on state residents and businesses of those new rates.

In light of these and other issues, we are carefully considering the agency's proposal and analyzing its prospective impact on Oklahoma. Given its complexity, and the potential significance of its impacts, we believe a longer period of review is warranted. We therefore respectfully request the agency to extend its deadline for public comments to at least 120 days following the date of its publication in the Federal Register.

Sincerely,



E. Scott Pruitt
Oklahoma Attorney General

E. SCOTT PRUITT
ATTORNEY GENERAL OF OKLAHOMA
313 N.E. 21st
OKLAHOMA CITY, OK 73105

Regina A. McCarthy
Assistant Administrator for the Office of Air and Radiation
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
AIR AND RADIATION

Mr. E. Scott Pruitt
Attorney General
State of Oklahoma
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105

Dear Attorney General Pruitt:

Thank you for your letter of June 16, 2011, requesting an extension of the public comment period for the proposed "National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units" (the Mercury and Air Toxics Standards rule), which was published in the *Federal Register* on May 3, 2011. The proposal identified a public comment period of 60 days; that period would have ended on July 5, 2011. The U.S. Environmental Protection Agency, however, recently announced an extension of the comment period by 30 days to August 4, 2011.

While we are extending the comment period, we are not seeking to extend the November 16, 2011, deadline for signature of the final rule, and remain committed to meeting that deadline.

The 30-day extension will provide the public with a 140-day period to review the proposal. As you know, interested parties were aware of the posting on March 16, 2011, of the signed proposal on the EPA's website (http://www.epa.gov/ttn/atw/utility/utilitypg.html), along with much of the pertinent supporting documentation (including the analyses used in establishing the proposed emission limits and the technical support documents). The proposal was published six weeks later, on May 3, 2011, marking the beginning of the formal public comment period. This will provide the public with approximately 140 days to review and provide written comments on the proposed rule and supporting documents. It will also provide at least 60 days for other documentation to be reviewed that was not posted on the website until after the proposed rule was signed. Due to the substantive issues specific to this rulemaking, this comment period is significantly longer than statutorily required.

Again, thank you for your letter. We look forward to the timely receipt of your comments.

Sincerely,

Gina McCarthy
Assistant Administrator